STATE BAR ADMISSIONS

And The

BOOTLEGGER'S SON

A Book Devoted to Opening the Legal Profession, Courts and State Bar Doors to Conservatives, Liberals, Pro Se Litigants and Minorities

With Special Section on the Oregon State Bar Professional Liability Fund (PLF)

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DEDICATION

This book is dedicated to my son, who I love more than anybody else in the whole world and did not get to see grow up due to the existence of irrational preconceived notions of actual Judicial bias against loving, caring noncustodial parents (both male and female) inherent within the diminished mental capacities of the trial court Judges of Marion County, Oregon. The cognitive affliction from which they suffer has understandably neutralized their capacity to utilize intellectual faculties in adjudicating legal issues. Lamentably and consequently, their perplexing judgments are predicated on senseless irrationality, and illogical reasoning with a predominant basis rooted in their prejudices and lack of comprehension. Such has unsurprisingly caused a marked inability for them to develop public confidence or respect. While their deficiency in developing respect has caused them to become embittered, this author's research indicates it is predominantly a product of their realization that furtherance of the anticompetitive interests of the State Bar and legal profession mandates a sacrifice of the general public interest, to which they are amenable.

It is hoped this book will not only improve the quality and delivery of justice for minorities and all Nonattorneys throughout the nation, but also that the manner in which its writing was inspired will prove to be a persuasive argument for beginning to treat children and their loving, caring parents fairly in courts of law by recognizing the inherent, natural right to joint custody, which will no longer be denied.

To: Mildred Douglas Wells

December 16, 1961

Dear Millie :

I am glad that Ty is turning out to be a rebel. Any boy who is any good has that spark in him when he is about Ty's age. The problem is to see that it does not die out, and that he retains the capacity to tell his old lady or his old man where to get off.

The only dangerous people in the world are those who are rebels without a cause, and the problem is as the years go by to find a good cause to which Ty can tie his rebellion. On that you and he can get together and come up with something pretty special and I am sure it will all work out to the best of the order.

Merry Christmas to you all.

Letter of U.S. Supreme Court Justice William O. Douglas to his daughter, regarding his grandson Tyrone Wells, Millie's son. The Douglas Letters, Edited with an Introduction by Melvin Urofsky, Adler and Adler Publishers, (1987)

PREFACE

It was the middle of the decade in the 1960s. I was five or six years old. He was about seventy. I was on vacation. He was on vacation. I didn't take crap from anybody. He didn't take crap from anybody. No one was going to tell me what to do. No one was going to tell him what to do. I was staying at the Condado Beach Hotel in Puerto Rico on winter vacation with my parents and brother. He was staying at the hotel next door, which I believe was called La Concha, with a young woman in her twenties. On occasion, I had a nasty way about me. On occasion, he had a nasty way about him. We were both very independent. I was a kid. He was U.S. Supreme Court Justice William O. Douglas.

Each day around 9:00 in the morning, I left my parents behind at the Condado Beach Hotel and went to spend the day at the La Concha Hotel. I generally came back only once or twice during the day. When I was hungry. The beach at La Concha was nicer, and more importantly the swimming pool at La Concha had a shallow end where I could stand. At the Condado Beach, the shallowest part of the swimming pool was over my head and since I wasn't a particularly good swimmer, I couldn't use the pool. I saw absolutely no reason why I should spend the day at the Hotel my family was staying at, if there was another Hotel nearby that I liked better. So my parents and brother spent their vacation at one Hotel, and I spent most of mine at another.

Whether Justice Douglas and I ever actually met, I am admittedly not sure. I vaguely recall that everyone was talking about a U.S. Supreme Court Justice staying at the Hotel with a very young woman. I also recall an interaction I had with an older man at the La Concha swimming pool one morning. I was swimming by myself and he was sitting by the pool. He asked where my parents were, and I responded in a smart-ass tone, that it was none of his business. He asked if I was staying at the Hotel and I responded that I was staying at the Condado Beach, next door. He said I couldn't swim in the pool if I wasn't staying at the Hotel. I essentially told him to get lost, although I don't recall the exact words I used. He then spoke to the lifeguard, who told me to leave, and so I left. While I knew the older man lacked any type of authority regarding the swimming pool, I also knew the lifeguard had complete authority in that jurisdiction and so I complied when the lifeguard told me. It was the only day I left La Concha early. The next morning, I went right back and the same lifeguard was there. I asked if I could swim, and he said as long as no one complained, it was alright. I never saw the older man again.

I really don't know whether the Prick who busted my chops was Justice Douglas or not. As much as I truly admire and respect all of the Justices of the U.S. Supreme Court, I love the idea that when I was about six years old, I may have told a U.S. Supreme Court Justice to take a hike. It would be just so perfect. But, I really can't say for certain that it was Douglas. Somehow, I earnestly believe that if it was Justice Douglas, and even though he scolded me, he admired my style and passion. He had the exact same style throughout his entire life. Frankly speaking, if it was him, I have no doubt that he thought I was a young, "up and coming" Prick. It was not until roughly thirty years later in the mid-1990s that I read his autobiography and many of the opinions he wrote as a Supreme Court Justice, which are absolutely phenomenal. While I have read biographies of many of the Justices, and as stated admire them all immensely, there is no doubt William O. Douglas is my favorite. He was the only Justice considered by both his friends and political adversaries to be a Son of a Bitch.[1] That's a man I can relate to.

If Douglas were alive today, I would tell him how much I admire his opinions, style, intellect and passion for the law. But, I still wouldn't get out of a swimming pool for the magnificent bastard.

TABLE OF CONTENTS

MEMORABLE QUOTES FROM BAR ADMISSION CASES

"The attorney and counselor . . . clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him . . . is something more than a mere indulgence. . . ."

Ex Parte Garland, 4 U.S. (Wall) 333 (1866)

"The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character."

Baird v. State Bar of Arizona, 401 U.S. 1 (1971)

"The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right."

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)

"If Ex Parte Garland stood for, or stands for, anything, it must be that the admission to practice is a federally-protected constitutional right."

Character and Fitness Investigations and Constitutional Rights of Individuals, The Bar Examiner, Vol. 43, 1974; Pg. 5, By Honorable Roy Wilkinson, Jr. Chairman NCBE

"The term "good moral character" has long been used as a qualification for membership in the Bar. . . However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."

Konigsberg v. State Bar of California, 353 U.S. 252 (1957)

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. . . ."

Schware v. Board of Bar Examiner, 353 U.S. 232 (1957)

"The judgment of the Supreme Court of Oregon is vacated and the case is remanded for reconsideration in light of Konigsberg v. State Bar of California . . . and Schware v. Board of Bar Examiners of New Mexico"

U.S. Supreme Court Order, May 13, 1957

"We . . . adhere to our former opinion."

318 P.2d 907 (1957) (Oregon Supreme Court Decision After Remand)

"Thus, we are neither bound nor relieved of our own duty in the matter by the United States Supreme Court's prior estimations of the proper ethical course of action. . . ."

State v. Balfour, 311 Or. 434 (1991) (NOT A BAR ADMISSION CASE)

"The right to practice law is a "fundamental right". . . ."

620 P.2d 640 (1980)

"The foregoing matters raise significant doubts about the fairness of the Committee's proceedings."
741 P.2d 1138 (1987)

"I think the contempt conviction is too unimportant to stand in the way of his admission—especially when this court (over two dissents, including mine) saw fit to admit three convicted felons—a murderer, a bank robber, and a drug pusher. . . ."
579 A.2d 668 (1990) (Dissent)

"Petitioner's jury acquittal . . . has special significance with regard to the Board's conclusion that petitioner lied three times in asserting her innocence.
397 So.2d 673 (1981)

"Thus, the Board has presented <Applicant> with the ultimate Catch-22: by maintaining her innocence, <Applicant> can never meet the Board's standard of candor."
650 So.2d 35 (1995)

"A hearing to determine character and fitness should be . . . for the purpose of acquainting the court with the applicant's innermost feelings and personal views on those aspects of morality . . . ."
282 S.E. 2d 298 (1981)

"The current administration of moral character criteria is, in effect a form of Kadi justice with a procedural overlay. . . . Politically nonaccountable decisionmakers render intuitive judgments, largely unconstrained by formal standards. . . . This process is a costly as well as empirically dubious means of securing public protection. . . . . non-routine cases yield intrusive, inconsistent and idiosyncratic decision-making. . . .Only a minimal number of applicants are permanently excluded from practice, and the rationale for many of these exclusions is highly questionable. . . ."
780 P.2d 112 (1989)

"By its opinion the majority has significantly changed the admissions process without first notifying applicant. . . law students, the bar, and the public.
518 N.E. 2d 981 (1987) (Dissent)

"It would be unconstitutional according to the court, "to read literally the language of the rule". . . ."
518 N.E. 2d 981 (1987) (Dissent)

"The only way this court could have been advised . . . therefore, was through an informal communication. The possibility that this unusual proceeding was initiated on the basis of rumors and gossip turns the entire admission process into a sham. . . ."
518 N.E. 2d 981 (1987) (Dissent)

". . . <Applicant> will not be permitted to practice law in this State, not because he has failed to follow the rules, but because we have."
518 N.E. 2d 981 (1987) (Dissent)

"In support of this contention, petitioner notes that only one member of the seven-member panel was present throughout the entire course of the two-day hearing. . . ."
561 N.E. 2d 614 (1990)

". . .lawyers are continually being reinstated, after disbarment, for conduct which any character committee would have unquestionably held to preclude their original admission. Instances of this kind, often manifestly unjustified, are most injurious to the reputation of the bar in the eyes of the public."

316 A.2d 246 (1974)

". . . I had no reason to believe that the U.S. Federal Penitentiary was a residence of mine. I never considered it a residence. . . ."

Applicant's Statement, 439 A.2d 1107 (1982)

"Moreover, once admitted to the bar, an attorney is subject to far less intense official scrutiny concerning his character than that which occurs during the application process. . . ."

439 A2d 1107 (1982) (Dissent)

"In denying petitioner's admission, we are not being consistent or fair. If petitioner were currently admitted to practice law in Minnesota and was subject to discipline for the same acts for which we now deny him admission, I do not believe the result would be as harsh as here. . . ."

502 N.W. 2d 53 (1993) (Dissent)

"I believe . . . that this applicant to the bar should not be subject to a far more harsh sanction than licensed attorneys who have, in addition to breaking the trust of their clients, committed forgery, perjury, or misappropriated client funds."

502 N.W. 2d 53 (1993) (Dissent)

"Until today, . . . being obnoxious . . . and being hard to get along with were not grounds for the extreme sanction of denial of admission to the Nebraska bar. The majority reaches far beyond the current rules governing admission. . . ."

LLR 1996.NE.137 (1996) (Versuslaw) (Dissent)

"While I do not approve of such characteristics, there are no bar admission rules for excluding an applicant on such grounds."

LLR 1996.NE.137 (1996) (Versuslaw) (Dissent)

"This brings us to the focal point: either we abide by the minimum standards we have set up or we disregard them for everyone and suffer the consequences. Credibility is a partner of justice. Disregarding the minimum standards previously approved will not enhance the credibility of the bar, the bar board, or the judiciary."

342 N.W. 2d 393 (1983)

"Applicant is never to be admitted to the practice of law in Ohio."

No. 97-407 2/18/98 1998.OH.36 (1998) (Versuslaw)

"He does not outright lie about such matters when questioned, but he is inclined to attempt to pass them off with glib, equivocal answers which put him in the best light. . . ."

541 P.2d 1400 (1975)

"I don't want to be admitted to the Bar so badly that if I felt my son was being mistreated and abused by my wife, ex-wife, I would not take him again. If I were informed and had reason to believe that she was doing something to him that was so harmful to him that a change of custody would be better for him . . . then I would take him."

Applicant's Statement to Oregon Bar, 610 P.2d 270 (1980)

"It is patently clear that the applicant still has no understanding of the legal or moral implications of his extra-legal conduct."

610 P.2d 270 (1980) (Oregon Supreme Court commenting on Applicant's Statement Above)

"An orderly examination is made difficult by the fact that the Board's record appears higgledy-piggledy. . . ."

No. 3-90-097-CV 7/24/90 1990.TX.1127 (Versuslaw)
Court of Appeals of Texas, Third District, Austin

". . . the Board claims that it was empowered to deny his application, not for the content of his answers, but instead, "for the way he answered. . . .""

No. 3-90-097-CV 7/24/90 1990.TX.1127 (Versuslaw)
Court of Appeals of Texas, Third District, Austin

"Our efforts at review are hindered because the record appears haphazardly. . . ."

No. 3-92-005-CV 1992.TX.2207 December 23, 1992
Court of Appeals of Texas, Third District, Austin

"We find it hard to imagine how anyone could overcome the stigma of chemical dependency under the Board's concept. . . . Furthermore, the Board places appellant in an impossible catch-22 situation: the Board lists involvement in AA as a condition of appellant's probationary license and yet attempts to use appellant's compliance with that condition as evidence of a present chemical dependency. . . ."

No. 03-97-00720-CV 1998.TX.42344 November 13, 1998
Court of Appeals of Texas, Third District, Austin

"The counsel for the bar association never notified <Applicant> that this would be an issue. <Applicant> had no opportunity to rebut charges that he was not qualified to practice based on this incident. The Board of Governors made no finding on this issue. . . . The majority has raised this issue for the first time on appeal, and then decided it without a fair hearing."

690 P.2d 1134 (1984) (Dissent)

"Finally, respondents maintain that they are allowed to question applicants about any matter which they deem relevant to good moral character. The implication is that respondents have absolute discretion in determining what is relevant to good moral character."

266 S.E. 2d 444 (1980)

"Justice Black, in Baird, and Stolar, recognized questions similar to those posed here as "relics of a turbulent period known as the "McCarthy era". . . ."

266 S.E. 2d 444 (1980) Footnote 12

2

INTRODUCTION

If there's one thing the Judiciary detests more than anything else it's a smart aleck. If there is one thing I am more than anything else, it's a smart aleck. Such being the case, it is easy to see there was going to be some friction between us right from the beginning. There is no doubt that trial judges irritate and annoy me. Similarly, I tend to irritate and annoy them. In such situations, someone has to change. Either I have to change or the entire Judiciary branch of government has to change. I have no intention of changing, so the Judiciary will have to. The simple fact of the matter is that I am entirely dissatisfied with this nation's legal profession, and not at all pleased that it has caused me to develop a deep, burning social conscience that compels me to effectuate improvement in the administration of justice. Frankly speaking, at this stage of my life I was really planning on spending most of my time on a beach in Aruba with a swimsuit model. Instead, this disease that I've developed called a social conscience, inspires me to straighten out the entire legal profession. I can honestly say that I wish I never discovered most trial court judges and attorneys don't know their ass from first base. In 1994, during my third year of law school at the University of Oregon I wrote my senior thesis on the "Unauthorized Practice of Law (UPL)." I got a "B+". The Professor recognized I spent a tremendous amount of time on the paper, but felt it wasn't quite up to an "A" paper. She was right. I didn't concentrate sufficiently on the economic aspects that drive the Judiciary. Frankly speaking, in hindsight, I'd probably give the paper a "C" at best, today. The economic aspects are quite simply put, the entire ball game.

Since 1995, I have spent an immense portion of my time studying UPL and the Bar admissions process. I have read hundreds of cases in all states, thanks to the Company known as Versuslaw which provides an Internet subscription for at a very low cost that provides access to published court opinions in every state. I have no affiliation with the company, other than being a subscriber to their service, but highly recommend it for those interested in reading court opinions. State cases, U.S. Supreme Court cases, several books, and articles in the Bar Examiner magazine are the primary sources I have used. The facts and irrational judicial reasoning applied in numerous Bar admission cases from most states are analyzed herein. The other main source of information I've used, is the magazine published by the NCBE known as the "Bar Examiner." I am extremely critical of articles in that magazine. I quote key, selected portions and analyze them extensively. It is my belief that the "Bar Examiner" articles from the 1930s set the foundation for the irrationality of the Bar admissions process today.

A word now about **"BOLDING."** I quote numerous passages from court opinions and the Bar Examiner articles. I have taken the liberty of **"BOLDING"** portions for the purpose of emphasis. It is important for the reader to understand that although they are **"BOLDED,"** herein, they generally were not **"BOLDED"** in either the opinions or the articles. Other than that, I have tried my best to ensure the quotes are wholly accurate. In the event errors are brought to my attention, they will be corrected in future editions. I do <u>not</u> include the names of the litigants involved with respect to the cases cited. This is somewhat unusual, since case citation normally does include litigant's names. I nevertheless felt it was appropriate to delete them. I make an exception for those few state cases where the litigant's name is already well known to the public, such as the Massachusetts case of Alger Hiss. I also make an exception for all U.S. Supreme Court cases, where the names are included.

Now, a little about myself. I received my undergraduate degree in accounting from Georgetown University and my law degree from the University of Oregon Law School. I am a licensed

CPA in New Jersey, and the District of Columbia. I am also a licensed attorney in the State of Pennsylvania and the District of Columbia. I first became a CPA in 1985, and then became licensed to practice law in Pennsylvania in 1995, then the District of Columbia in 1997. I've been an attorney for less than six years (as of 2002), and I'm making waves. Big waves !! As I see it, the manner in which the legal profession has been conducting itself is totally unacceptable, and needs to change immediately. I have never been disciplined by any professional board, and in fact, have never even had one single ethical complaint of any nature ever filed against me for any reason. I've never been convicted of any crime in my entire life. I am 41 years old as of 2002. I do admittedly have a tendency to "annoy" (excuse me, make that really "piss off") trial court judges within the context of civil litigation. For this reason, it seemed to be a prudent idea that I not practice law. In fact, I have never represented even one single client in any matter of any nature. It would only lead to problems. The state trial court judges lack a sufficient knowledge of the law, and continually conduct themselves in an irrational manner extending beyond their authority. They are over-emotional, hypersensitive, and quick to punish litigants (particularly, Pro Ses) simply for exercising constitutional rights. Such being the case, I realized that if I practiced law, I'd set a national record for the quickest summary contempt.

I use profanity on occasion, but not too often and typically only in jest. I love the underdog in almost any context. I believe in the opinions expressed herein fervently. They were not quickly formed, but developed in a gradual manner over the last eight years, beginning with my first year in law school. I have enormous faith and confidence in the U.S. Supreme Court, and have read biographies of Justices Marshall, Black, Douglas, Holmes, Warren, Powell, Harlan, Field and a few others. I am relatively well versed in American history, having read biographies of every President through the early 1900s. I am knowledgeable to a limited and lesser extent in western philosophy including Locke, Hume, Rousseau, More, Mill, Kant, Hobbes, and Machiavelli. Machiavelli's "Prince" incidentally is probably the best 90 pages that I've ever read about government. I also have enormous faith and confidence in the opinions of the general public, but for the most part believe that most attorneys, State Bars and trial court judges are incompetent nitwits. Few have read any American history or western philosophy. They have little appreciation for court rules and are under the mistaken impression that court rules apply only to Nonattorneys. I wouldn't mind their pompous arrogance so much if they were at least knowledgeable and competent in the law. In fact however, most are bumbling, stumbling buffoons.

A good analogy involves the game of golf, which I have at times played competitively in my life, including four years in high school and one year in college. Trial court judges and local attorneys in small towns remind me of a guy who gets up on the first tee of the golf course dressed in the best clothes and playing with the best golf clubs you can possibly buy. They then proceed to play the first hole like a typical duffer and score an 11. When asked by the other players what their score was, they reply, "Par." You can't help but look at them and think, "Who does he think he's fooling ?" That's what the local attorneys and small town judges are like. They want the litigants and the public to believe they really know what they're doing and be under the impression they have experience and knowledge in the law. In truth however, the record typically demonstrates they're not much more than judicial duffers. I detest attorneys for the most part, but do believe there are a few good ones. Too few. Many of these beliefs will become more apparent, as you read the book. Keep in mind, that I am not writing to impress the intellects, or the university professors. If they don't like my writing style, too damn bad. I'm writing to convey a strong message about the legal profession. If I get my point across, that's all that counts. I am a "bottom line" person. And the bottom line of this book is that the logic flows. The point is made and the message gets across. Whether you like the book or not, one thing is certain. When you're done reading it, you'll know where I stand. It contains some emotion, humor, criticism and extensive analysis. The conclusion I want you to reach after reading it can be summarized as follows :

"He's right. The State Bar Boards of Examiners are wrong."

3

THE GOAL and THE STRATEGY

I have not written this book for mere posterity. I am seeking to achieve a clear and distinct goal. My goal is to constitutionalize the State Bar admissions process for the entire nation. The essence of my position is that pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the State Bar admissions process is unconstitutional. The reason is that licensed attorneys and Judges are held to a lower standard of conduct than a Nonattorney Bar Applicant. And yes, you read that right. Attorneys and Judges enjoy a lower standard of conduct than Nonattorney Bar Applicants.

This is because State Bar members are not required on a regular and periodic basis to provide the same type of character information required of Bar Applicants. In fact, there is no character assessment that is even faintly comparable to the initial admission process, for State Bar members when renewing their law license. It is my position the character questionnaire submitted by an individual when applying to the Bar becomes irrelevant to their "current" character, once they have been licensed for at least five years. People change over time. The Nonattorney Applicant by being required to complete the character questionnaire is held to a higher character standard than the licensed attorney, since the majority of Bar members have been licensed more than five years. The public is harmed by this irrational disparity.

Most State Supreme Courts have held that the burden of proving good character is on the Applicant when seeking admission, but on the Bar with respect to proving bad character for Disbarment. Once again, this irrationality results in the Bar member being held to a lower standard of conduct than the Applicant. The licensed attorney is subject to the ethical rules of conduct, but the Nonattorney Applicant is not. Such being the case, if indeed there is to be a disparity, then the Nonattorney should be held to a lower, rather than a higher standard of conduct compared to the licensed attorney. To hold otherwise, results in attainment of the license to practice law being an entitlement to engage in immoral conduct. The fact that State Bar members are subject to ethical rules of conduct can not rationally be construed as justification to exempt them from the character review required of a Nonattorney. If anything, such responsibility is cause for a more extensive, rather than diminished character review.

The ethical rules of conduct for attorneys do not penalize immoral conduct that can result in denial of admission for an Applicant. The ethical rules contain no requirement that licensed attorneys pay their debts, but candidates can be denied admission for failing to pay debts. The ethical rules contain no limit on the number of traffic tickets a licensed attorney may receive, but candidates can be denied admission for such trivial matters. Bar Applicants can be denied admission for being glib, facetious, obnoxious, the manner in which they left previous jobs, their attitude, what other attorneys say about them, high school suspensions, unsatisfied judgments, drinking alcohol, and even most incredibly for filing civil suits.

If indeed the Bar makes such inquiries of Applicants to protect the public, rather than to protect its' own anticompetitive economic interests as I assert, then how can the Bar rationally justify its failure to make similar inquiries of licensed attorneys and Judges on a periodic basis? Is the public's need for protection from incompetent lawyers diminished once admission to the Bar is attained? Do attorneys as a whole have a reputation amongst the general public as possessing better character than the average Nonattorney? The answers are, "It can't," "No," and "Not a chance."

The specific goal I seek to achieve is that Bar Applicants should only be required to respond to character inquiries to the extent similar inquiries are made regularly of licensed attorneys. It is further my position that both should have to answer whether they have ever been

convicted of a crime triable by jury. Naturally, a criminal conviction may be grounds for denial of admission to the Bar. The operative term is “may.” The determination would depend on the type of crime, the period of time lapsed since the criminal conduct was committed and the extent of the Applicant’s rehabilitation.

For purposes of addressing these points, I would typically exclude the “offense” of contempt. The reason for this is that contempt is typically not triable by a jury. It often is the result of an irrational Judge who simply does not like a litigant and imposes a contempt “conviction” in a certain instance even though such is legally beyond that Judge’s authority. Personality clashes between irrational Judges and highly skilled Pro Se litigants, are often the cause of contempt “convictions.” Such matters should not constitute grounds for denial of admission to the Bar. In fact, several U.S. Supreme Court Justices were at one time or another in their careers held in contempt of court, as will be demonstrated herein.

A few matters should be addressed about how I will be proceeding. Chapters 1-14, provide an overview of the attorney licensing process, including its' history, how it works and other related topics. In Chapter 15, I present and analyze the irrational and disturbing opinions of numerous writers who authored articles in the magazine known as the "Bar Examiner," from its first issue in the early 1930s to the mid-1940s. That magazine is the official publication of the NCBE (National Conference of Bar Examiners). I have carefully selected what I believe to be key quotes from the publication. It is my intent to demonstrate through citation to these articles, that the admissions process was not intended to protect the public, but rather instead to foster anticompetitive and wrongful, prejudicial notions of the State Bars. Some of the things published in the Bar Examiner are nothing short of detestably incredible.

Chapter 16 addresses the close nexus between McCarthyism and the State Bar admissions process. Chapter 17 describes six warning signs that suggest a State Bar is trying to control litigation outcomes, by leveraging the personal and professional lives of the attorneys they license. Chapter 18 presents key U.S. Supreme Court Bar admission cases. Chapter 19 explores whether the Judiciary can withstand scrutiny under its' own moral character standard. Chapter 20 provides what I believe is the most comprehensive analysis of Bar admission cases ever published in this nation. I have carefully scrutinized hundreds of opinions from all states, and selected key citations from them. I then render my own analysis. I have done so for the purpose of demonstrating that the Bars still persist in promoting the detestable values promoted by the NCBE and its’ magazine, the “Bar Examiner,” in the 1930s. In addition, I seek to demonstrate there is a propensity of the State Bars to usurp well-accepted case precedent of the United States Supreme Court and also their own State Supreme Courts. Chapter 21 contains biographical information of selected U.S. Supreme Court Justices. I concentrate on any aspect of their background that might cause a State Bar to deny them admission on moral character grounds. Chapter 22 presents U.S. Supreme Court opinion excerpts in which the Justices criticize each other. Chapter 23 presents a series of excerpts from the U.S. Senate Confirmation Hearings pertaining to the appointment of Clarence Thomas to the U.S. Supreme Court. During the course of those Hearings, he properly and severely chastised the unfairness of the investigative process with respect to U.S. Supreme Court appointees. His criticism is even more valid with respect to Bar admissions. Chapter 24 discusses what is known as the "Judicial Function Exception." The Appendix includes Bar admission forms.

Take a look at the Bar admission forms and questions asked. See if you can fill the application out with an absolute certainty that your answers are complete and accurate. Try to probe your memory for those questions that require you to think back more than 10 years in your life, and consider what you should do if you can’t remember the requested facts. If you're over 35 years of age, you probably don’t have even a miniscule chance of completing every single application question completely and accurately. Look at Question #19 on the Alabama application that inquires about your Father’s occupation and your Mother’s occupation, and consider whether facts about your mother and father are really any of the State Bar’s business. Most of the other questions are similarly irrational. If after looking at most of the application, you still think the questions are reasonable, then take a look at Question #53, which is

characteristic of a question included on many State Bar applications. I submit there is not one single reader of this book or individual ever admitted to any State Bar who has ever answered this type of question completely and accurately. The reason is that the question is logistically impossible to answer. It reads as follows:

> *"Is there any other incident(s) or occurrence(s) in your life, which is not otherwise referred to in this application, which has bearing, either directly or indirectly, upon your character and fitness for admission to the Bar?"*

My general strategy can be summed up as follows. Demonstrate by analyzing articles in the "Bar Examiner" that the admissions process was designed to foster the enhancement of State Bar power and monetary interests of attorneys at the expense of the public, and also to foster wrongful, prejudicial notions. In conjunction with this is the corollary that the admissions process is <u>not</u> intended to protect the general public. Then demonstrate by analyzing contemporary Bar admission cases that the admissions process has not changed all that significantly, from the original intent as it existed in the 1930s. I also will demonstrate how the moral character standard currently utilized, is so irrational, that even the Judiciary itself, and U.S. Supreme Court Justices can not satisfy it. This will prove that there is a dire need for change and reform. The process needs to become constitutional in nature. The change and reform I propose is simply that licensed attorneys and Judges cannot be held to a lower standard of moral character than the Nonattorney Bar Applicant. So simple of a premise that any State Supreme Court moron should be able to understand it.

4

THE IMPORTANCE OF THE STATE BAR ADMISSIONS PROCESS

You've just been arrested and charged with some type of crime. You have just been a victim of a crime. One of your friends or family members has just been a victim of a crime, or accused of a crime. You're going through a divorce. You're being sued by a creditor. You're late on child support payments, or you're not receiving child support payments that you're entitled to. Your house is being repossessed. You've been subpoenaed to testify as a witness. You've just been in a car accident. (Man, you are definitely having one lousy day.)

Anytime you are involved in anything that potentially involves litigation or a court proceeding of some type, in all likelihood you will either need a lawyer or be opposed by a lawyer. The type of people who become lawyers ultimately determines the type of justice system we have, and therefore affects every single citizen that is a Nonattorney. What type of person do you want to hire as your lawyer? Do you want their primary interest to be fighting on your behalf, or are you more concerned that they conduct themselves in a manner that pleases the agency that licenses them? Do you want them to be more concerned about the financial interests of the agency that licenses them, or more concerned about helping you? Do you want them to have a fear inside them, that if they zealously represent you and offend the opposing party's attorney during the process, that they may lose their license? It's my guess the average Nonattorney's concern with lawyers is singular. They want someone who will fight as hard as possible to win their case, without regard to the impact such has on the financial interests of other attorneys.

So, I present the question again. What kind of lawyer do you want to represent you? The determination is made through the State Bar admissions process. The State Bar admissions process ultimately affects all Nonattorneys one way or the other. If it is designed to foster a fear and subservience within the attorney, then their clients will not have zealous representation. If it is designed to admit convicted felons on a regular and pervasive basis, then clients will also suffer. If it is designed to place new attorneys at a disadvantage compared to older attorneys, by requiring new attorneys to disclose an unreasonable amount of information about their personal life, then the clients of new attorneys are at a comparable disadvantage. If it is designed to instill in the new attorney an understanding that rules apply one way to strong regulatory agencies, but in a different way to weak individuals, the attorney can be expected to conduct himself in accordance with such knowledge.

If it is designed to exclude minorities, then Nonattorney minorities will not be able to obtain competent representation. If it is designed to glean out individuals with bad "attitudes," then clients must expect courts will ultimately adjudicate cases based upon litigant "attitudes," or the "attitude" of attorneys representing the litigants. The facts, law and evidence will have a diminished importance in comparison with the "attitudes" of those involved. The State Bar admissions process affects every person, and every single facet of society. That's why it is critical for the process to be objective, fair, and clearly defined. Currently, it is arbitrary, discretionary, capricious and as correctly stated by the U.S. Supreme Court, a "dangerous instrument."

5

THE BOOTLEGGER'S SON

In a separate section, I review numerous articles from issues of the Bar Examiner during the 1930s. State Bar notions pertaining to "The Bootlegger's Son" however, are of such importance that I have titled this book based on them. The Bootlegger's Son describes how the State Bars envisioned their admissions process in the 1930s, and while there is little doubt they would deny it is their goal today, I submit that it is precisely what they are still looking for. So what is "The Bootlegger's Son" all about?

The January, 1932 issue of The Bar Examiner poses what is presented as a "Hard Nut for Character Committees to Crack." It is a hypothetical fact set dealing with a fictitious Bar Applicant with the question posed as, should this individual be admitted to the Bar? I am hopeful readers will agree that what the NCBE (National Conference of Bar Examiners) irrationally suggests is a difficult case is in reality a simple one. The facts as presented, demonstrate no reason for denying admission, but rather instead are a reflection of the NCBE's prejudicial attitudes. A product of the NCBE and State Bar's lack of good moral character, to use their own phraseology against them. They do not want admission decisions to be based on a person's conduct, but rather on who they know or in this instance, who they would have been better off not knowing. This section from "The Bar Examiner" is small in size, but monumental in societal impact.

A HARD NUT FOR CHARACTER COMMITTEES TO CRACK

Bar Examiner, January, 1932 (p.83)

THE BOOTLEGGER'S SON

The facts about the Applicant are as follows :

> "A law student who is qualified as far as preliminary and legal education is concerned has taken and passed his bar examination in a manner satisfactory to the Board. . . .
>
> He has lived for a long time **in a neighborhood** where there are many reputed to be engaged in the illicit conveyance, trading in and sale of liquor in violation of both the State and Federal laws. **His father** has been arrested and pleaded guilty to the sale of intoxicating liquors and paid his fine. . . .**A relative of the family** living in the same house has been arrested, indicted and tried for the illegal sale of liquor . . . .**Another immediate relative of the family has been arrested for the sale of liquor, and he and his wife are reputed to be running a speakeasy at the present time.** . . . Under these facts, and having no further information, should his character qualifications be deemed sufficient to admit him to practice law ?"[2]

The determinative issue is whether the fact that an Applicant lives in a bad neighborhood, has relatives who have been arrested, indicted and tried for the illegal sale of liquor constitutes sufficient

grounds to deny the Applicant admission. A proposed answer is presented in the February, 1932 issue and concludes that admission should be denied on moral character grounds. Interestingly, it correlates moral character to the need for diminishing the Supply of attorneys. The proposed answer states:

> "He seeks a privilege, not a right. **Not all candidates who are qualified need be admitted if the court feels that there are too many attorneys** to supply the needs of the public.
>
> There are two primary and essential qualifications which each applicant should have : First, moral character, second, (a) a general education, and (b) knowledge of law. I feel that the first of these, moral character, is by far the more important as between that and education. . . .
>
> **Inheritance and environment** are generally conceded to count much in the formation of character. They are among the best tests we have in regard to the young man.
>
> These facts being so, I feel that **in the case set forth by your correspondent the inheritance and environments are bad.** The contact of the youth with continued violation of the law, especially in his own home, and among his own relatives, is such a detrimental force and so inclined to shape his view of right and wrong as regards the administration of the law, that he is unworthy of trust or of the certificate of reliability to be issued by the Supreme Court assuring the public that he is fit to practice law and to be trusted by them. . . . **I am of this opinion even though the individual has not thus far in his short period of maturity shown a tendency to moral delinquency."**[3]

There are two notable aspects to the foregoing answer. First, it is predicated on the assertion that moral character is the most important characteristic for an attorney. Second, it asserts that inheritance and environment are determinative of the moral character issue. This is notwithstanding that a person typically has absolutely no control over their inheritance or environment. The conclusion that must inescapably be reached upon review of this proposed answer, is that the "moral character" requirement is used by Bar Examiners as a "dangerous instrument" to foster prejudicial, anticompetitive notions of the legal profession. Good moral character becomes anything the Bar Examiner wants it to be. To make this point perfectly clear and in a very blunt fashion, one need only consider the diabolical nature of Adolf Hitler. Hitler believed "good moral character" consisted of exterminating Jews. Interestingly, he had substantial support in the early issues of the Bar Examiner and the incredible comments made in support of him by the NCBE will be discussed in subsequent sections herein.

The Bootlegger's Son exemplifies detestable system wide judgment by the NCBE and ABA. It demonstrates the organization's propensity toward using character review as an arbitrary, subjective mechanism to accomplish group organizational goals at the expense of justice. When reading contemporary Bar admission cases, the reader is encouraged to reflect back on how the Bar is attempting to build an admissions process based on the predicate of "The Bootlegger's Son."

6

HISTORY OF BAR ADMISSION AND THE ATTORNEY LICENSING PROCESS

What makes a person an attorney? What allows them to carry a law license, represent individuals in Court and hold themselves out to the public as a lawyer? What requirements do they have to meet ? First, there are a few rudimentary basics that need to be addressed. We have two sets of governments in our nation; federal and state. Each has their own set of laws, with citizens in a state being bound both by the federal law and the law of their particular state. The United States is comprised of three branches of government which are the executive, legislative and judiciary. Each state is comprised of three similar branches.

The first and most important branch is the Legislative branch which consists of Congress in the federal government and state legislatures for the state governments. Congress is charged with enacting federal laws, and state legislatures enact state laws. State legislatures also typically have a variety of other duties and powers. Included in these other duties and powers is generally the ability to set the rules and standards for the issuance of professional licenses in the various occupations (excluding law). The second branch is the Executive which is headed by the President in the federal government, and the Governors for the state governments. The Executive supervises and directs various administrative agencies and is charged with the responsibility of seeing that the laws are administered properly. Third on the totem pole, is the Judiciary consisting of federal courts and state courts charged with resolving disputes pertaining to the law and also interpreting the law.

Members of most professions are licensed by agencies (typically, referred to as “Boards”) that are under the supervision and direction of the Legislative branch of government in most states. The professions typically licensed by Legislative agencies include accounting, medicine, dentistry, architecture, and a wide host of other professions. There is one major exception. That is the practice of law. Lawyers today are rarely licensed by agencies under the direction and supervision of the State legislature. They are typically licensed by the Judiciary branch of government. The Judiciary’s power to license attorneys has only been firmly established in this nation as a phenomenon of the 20th century. Prior to the 1930s, it was a hotly contested issue, with many state legislatures successfully claiming the power. Most citizens are not aware of this and Courts typically mislead the public into believing that their power to license attorneys has been undisputed since the formation of this nation. Their misleading assertion lacks candor and is not supported by historical facts. The result of the Judiciary successfully grabbing control of the licensing power in the early 20th century is that rules, procedures and protections that apply to the licensing of every other profession are for the most part inapplicable to the licensing of lawyers. The Judicial administrative agency vested with the power to license attorneys is typically known as the Board of Bar Examiners. This book will demonstrate how within the context of the State Bar admissions process, it is an unconstitutional licensing agency unlike that of any other profession.

When I first entered law school at the age of 32, I was already a Certified Public Accountant. I was therefore somewhat familiar with the licensing process for a professional. The requirements to become a CPA were as follows. First, I needed a minimum number of accounting credit hours from college. Second, I needed two years of public accounting experience. Third, I had to pass a comprehensive examination known as the CPA exam. The CPA exam in the early 1980s when I took it, was comprised of four parts. Few individuals passed all four parts in one sitting. As I recall, the

percentage that did so was about 5%. I accomplished the feat, passed all four parts in one sitting and was certified at age 24.

The CPA exam is a uniform exam, which means that whether you sit for the exam in Arizona or New Jersey, you answer the exact same questions. Although each state sets its own grading standards for passing the exam, the questions are the exact same in every state. Consequently, if you pass the exam in New Jersey, you can transfer the grades to another state, such as Arizona and obtain certification. As part of the CPA application form, you typically provide basic information detailing recent addresses you have lived at, places of employment, education and must disclose whether you have ever been convicted of a crime. For the most part, that's about all there is to it. Once you're certified in one state, you can use that license to easily gain reciprocity in another state. For instance in my own case, although I originally passed the exam in New Jersey, I was certified in Arizona, and then obtained reciprocity in other states just by filing the paper work and paying the necessary fees.

I was shocked to learn in law school that the process to obtain a law license was immensely more complex, and not nearly as objective. Instead of being admitted when you satisfied a clear set of definable criteria, the attorney licensing process was designed to foster denial of admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners. Applicants could be denied admission for being cavalier, glib, facetious, smart-alecky, being unable to pay debts, participating in civil suits, writing letters to express their opinions about the legal profession or a wide host of other blatantly unconstitutional grounds. Purportedly, such admission denials are designed to ensure that attorneys possess the "requisite character" needed to "protect the public" from dishonest lawyers and incompetent legal services. Essentially however, the criteria are so subjective and vague that they allow the Bar to deny admission simply based on whether they "like" the Applicant or not. This obviously creates an environment whereby qualified Applicants are regularly denied admission due to their race, appearance, attitude, or economic standing in society. Facially, the Bar does not deny admission on the basis of race, but as a matter of substance due to the subjective nature of the application process, such denials are common and the admission standards foster the opportunity. Its' disturbing history certainly confirms the intent.

The criterion to become an attorney in most states is as follows. First, you need to graduate from an ABA accredited law school. This usually takes three years, although it can be accomplished in two and a half, as I did. There are a few states that allow an Applicant to sit for the Bar exam if they've graduated from a non-accredited law school, and the ABA accreditation process is certainly less than commendable. It has been subjected to justified legal attack in recent years by the U.S. Justice Department. Nevertheless, currently the normal route to licensure is to graduate from an ABA accredited law school.

Second, the Applicant needs to pass the Bar exam. Unlike the uniform CPA exam which is exactly the same from state to state, the Bar exam varies widely between the states. Only a portion of it is uniform which is known as the MBE (Multistate Bar Exam). The MBE is an objective, multiple choice examination. Most states however, also require the Applicant to take a state specific exam which is comprised of essay questions. Since the state portion consists of an essay exam which is subjectively graded, the admissions committee is able to exclude applicants based on their subjective appraisal of an Applicant's ideas and attitudes as expressed in answers to the essay questions. Many states require lawyers who have passed the MBE in one state, to sit for the MBE exam again when applying to their state. That obviously makes no sense. Unlike the CPA Boards, the Bar Boards do not typically respect passing of the uniform MBE portion in another state, unless the Applicant has also actively engaged in the practice of law for 5 out of 7 years. Many attorneys such as myself, have never practiced law.

The third requirement is the real kicker. The Applicant must pass a so-called "moral character" review to determine if they possess the "moral character and fitness" necessary to become a lawyer (I know it seems like a contradiction in terms, based on the disrespect most Nonattorney citizens have for the "character" of lawyers). The CPA licensing process equivalent of character review generally

consists of answering the question, "Have you ever been convicted of a crime?" If the Applicant truthfully answers "No," the criterion is met. If the answer is "Yes," the Applicant normally must provide all relevant details and circumstances. The Applicant may also be required to come in for an interview with the CPA Board to personally answer questions about their criminal conviction. The Applicant may then be admitted or rejected based on the nature of the crime and the explanation rendered. In any event, it is a nice, clear, bright line, articulate standard. If you've never been convicted of a crime, then you pass. If you have been convicted of a crime, then you may or may not be admitted depending on the case.

The State Bar's moral character review process is immensely more complex. There is no clear bright line, objective standard. It is wholly subjective in nature and encompasses a wide range of vague questions. The answers can be interpreted by the Admissions committee in any manner they please. Essentially, as a matter of substance and pragmatism, they can use the answers to exclude Applicants based on race, appearance, attitude, economic standing or any other criteria they choose. The questions are intentionally designed to be so comprehensive and detailed, that it is virtually impossible to provide complete and accurate answers. Essentially, the questions are designed to promote immaterial errors, at which point the Admissions committee gains the power to falsely assert the Applicant lied on the application. Such a finding in and of itself constitutes grounds for denial of admission.

The most vulnerable point of logic facing the State Bar Boards of Examiners is that if indeed the character questions are designed to ensure moral character and protect the public as the Bars ostensibly assert, rather than foster the legal profession's anticompetitive, economic interests and prejudicial attitudes, then why don't licensed attorneys have to answer the same questions on a periodic basis? Currently, once you pass the admissions hurdle for a state, you never have to provide that state with comprehensive character information again.

Obviously, a person's current character can not be assessed as "moral" based solely on answers to character questions which are based on events that are five, ten or twenty years remote in time. If the character questions are essential to protecting the public, then all licensed attorneys and judges should be required to answer the questions on a regular and periodic basis. To do otherwise, results in the Nonattorney Bar Applicant being held to a higher standard of moral character compared to licensed attorneys and Judges.

This violation of the Equal Protection Clause to the U.S. Constitution makes the State Bar Boards of Examiners particularly vulnerable to attack and exposes the frailty of their position. **Put simply, the average Nonattorney citizen recognizes that is unjust to hold licensed attorneys purportedly subject to the ethical rules of conduct, to a lower standard of moral character assessment than a Nonattorney Bar Applicant.** The primary focus of this book is on the character review portion of the attorney licensing process, since that is the area where the Applicant is exposed to the most subjective, prejudicial, and arbitrary nature of the process. Essentially, at the whim and mercy of his future competitors.

So how did this irrational nightmare begin? During the Revolutionary War? The early 1800s? The Civil War? The late 1800s? Certainly, one would not think it was a product of the 20th century, but that is precisely the case. The modern State Bar Admissions' process is a product of the Depression era and the ABA's (American Bar Association) political rise in the early 20th century to establishing control over the Judiciary branch of government. What the ABA and its' child organization the NCBE (National Conference of Bar Examiners) did, was capitalize on the economic weakness of the Nonattorney general public at their most vulnerable period of time (the Depression) to establish the power of the legal monopoly. When the Depression came, the general public was economically helpless. People just wanted to get food on their table and housing for their family. Their vulnerability could be capitalized on by the ABA. Bar organizations guided by the NCBE in the 1930s, began severely restricting the admissions process, continuously making it more and more difficult. The admissions process as we know it today, is a product of the Depression. A time when lawyers like all

others were experiencing financial difficulties and were willing to implement desperate measures to better their economic position at the expense of Nonattorneys. At the same time they restricted Bar admission standards, they widened the scope of what constitutes "legal services" by enacting irrational prohibitions against what is called the "unauthorized practice of law (UPL)." Their concept was simple. Expand their allocated segment of the marketplace by enacting irrational UPL prohibitions and then reduce the supply of lawyers available to service that market by enacting irrational moral character standards that allowed Bar admission to be restricted on a subjective basis. **The end result after applying economic principles of supply and demand, would then obviously be a lower number of lawyers to service an expanded market with higher legal fees enjoyed by attorneys.**

In early colonial times, the process of becoming a lawyer was haphazard at best and varied widely from one colony to another. The road to becoming a lawyer during those times for some great Americans was as follows. Patrick Henry's primary source of "law school" training consisted of listening attentively to conversations of members of the Bar at Shelton's Tavern, which he frequented regularly to drink. Purportedly, he set off to take the bar examination which was an oral exam, having studied for less than two months. Henry took his "oral exam" from George Wythe (later to become Thomas Jefferson's tutor). Wythe had begun his legal practice under the auspices of Zachary Lewis, who was the father of Henry's close friend John Lewis. Henry passed and Wythe became the first signator on Henry's license. Henry then took the next portion of his "oral exam" from the esteemed John Randolph, who upon learning that Wythe had signed the license also agreed to become a signator.[4] Thomas Jefferson became a law student at the age of nineteen studying under the private tutelage of Wythe. Perhaps the most famous U.S. Supreme Court Justice ever, John Marshall enrolled in William and Mary law school on May 1, 1780 and had his law license just a few months later. [5] It does not take a genius to recognize that licensure during those times was predicated most simply on who you knew, and not what you knew. That is what the legal profession has always wanted to preserve. It was inarguably a morally reprehensible start to the nation's legal profession, but admittedly somewhat characteristic of the English tradition from which it was derived.

The rise of Jacksonian Democracy in the first part of the nineteenth century eliminated the few educational requirements that were necessary to become a lawyer and the 19th century is characterized primarily by lawyers that educated themselves or read under the tutelage of another lawyer. As late as 1900, few states even required a law degree for admission to the Bar. For those students that did attend law school, the standard course in 1850 was one year. Very few law schools required more. The famous Justice Oliver Wendel Holmes entered Harvard Law School in the fall of 1864 and received his degree in June, 1866 even though he had stopped attending the lectures. The concept of the three year law degree typically required today, was unheard of throughout the entire nineteenth century.[6]

Admission requirements to the Bar began tightening up during the last part of the nineteenth century. Between 1880 and 1920, most states adopted admission procedures including the publication of Applicant's names, probationary admissions, recommendations by the local bar, and investigation by character committees. By 1917, three quarters of the states had centralized certification authority in Boards of Bar Examiners. It was also during the close of the nineteenth century that the American Bar Association, organized in 1878 to protect the anticompetitive interests of the legal profession, at the expense of the general public began spearheading a campaign for higher professional standards. Ostensibly, for public relations purposes this was to protect the public from the delivery of incompetent legal services. Over 100 years later, most members of society would probably agree that the purported goal, even if it were not disingenuous has certainly not been achieved.

Typically, candidates denied admission on the disingenuous ground that they were "unworthy," and "morally weak," were Immigrants, Black, Women or Jewish. In 1874, George Strong advocated more stringent admission requirements to Columbia Law School on the ground that this would:

"keep out the little scrubs whom the school now promotes from the grocery-counters . . . to be gentlemen of the Bar."[7]

Historical evidence irrefutably confirms that the rise of the monstrosity known as the ABA is attributable to the role of subservience the legal profession occupied throughout most of the nineteenth century. The Civil War resulted in lawyers being relegated to a negligible political force. After the Civil War, a number of cases established that the right for a person to practice a profession was precisely that ; a "Right" rather than a "Privilege." In fact, the United States Supreme Court conclusively decided the issue shortly after the war in *Ex Parte Garland*, 71 U.S. (Wall) 333 (1866). Cases also established that the power to license lawyers vested in the Legislature, rather than the Judiciary. New York in 1860, *In re Cooper*, 22 N.Y. 67 ; California in 1864, *Ex parte Yale*, 24 California 241; and North Carolina in 1906, *re Applicants for License to Practice Law*, 143 N.C. 1. *Cooper* was considered the leading case in the nation on the issue. Lawyers quite simply put were "on the run." Left to stand, those cases would have resulted in a legal profession with a properly diminished capacity to exploit the public in order to foster their self-serving economic interests and societal notions of "group thought." The ABA mobilized in 1878 as a political force to ensure the attorney's stature, power and privilege within society. Their initial concern was neither the Bar admissions process or the "unauthorized practice of law." Rather instead, they had no alternative but to first wrest control of the licensing process. If they could obtain the power to license attorneys, then they could set the standards and control the market for legal services.

The ABA initiated a strategic attack plan to seize the licensing power and succeeded through a series of litigations. Their success was distinctly attributable to the fact that the individuals who decided the cases, (i.e. Judges) were attorneys themselves and willing to capitalize on the opportunity presented. Pennsylvania played a dominant role, ruling in the case, *In re Splane*, 123 Pa. 527 (1888) :

"No judge is bound to admit, nor can be compelled to admit, a person to practice law who is not properly qualified, or whose moral character is bad . . . . Whether he shall be admitted or whether he shall be disbarred is a judicial and not a legislative question."

By 1932, Arizona (*in re Bailey*, 30 Ar. 407(1929)), Wisconsin (*State v. Cannon*, 240 N.W. 441 (1932)), South Dakota (*Danforth v. Egan*, 23 S.D. 43 (1909)), Illinois (*People ex rel Illinois State Bar Association* 342 Ill. 462 (1931)), and numerous other states had followed. The power to license attorneys was seized by the Judiciary, in cases the Judiciary itself ruled on, similar to how they seized the power to interpret law in the seminal case of *Marbury v. Madison* in 1803. In the process of seizing the power to license attorneys, the legal profession also attempted to neutralize the U.S. Supreme Court's opinion in *Ex Parte Garland*, which had conclusively established that the ability to engage in the practice of law was a "Right," rather than a "Privilege." State Supreme Courts having secured the licensing power began falsely asserting that exercise of the power was a "*Privilege*," rather than a "*Right.*" The exact same notion of "*Privilege*" that England had adopted and which inspired our drive for independence. The legal profession was then poised to enact prohibitions against the "unauthorized practice of law" and to irrationally restrict admission to the Bar. They did so with vigorous fever. They seized the licensing power with their own Judges. They would now use it to expand their market and reduce the number of available attorneys to service that market. The result would be higher legal fees at the general public's expense. They would accomplish their goal by having the audacity to falsely assert they were trying to protect the public.

UPL and Bar admission restrictions were the two final objectives to raise the Judiciary above the Executive and Legislative branches of government. The Judiciary already had grabbed the power to interpret law in *Marbury v. Madison*. By seizing the licensing power, they would control the individuals who presented the legal arguments. They would control them by controlling their livelihood.

Essentially, the notion can be easily summarized as, "control the man's livelihood and ability to feed his family, and you control the man." Newly enacted minimum requirements for admission to the Bar were also designed to stem the flood of those whose inadequate command of the "King's English" had allegedly debased the profession. At the first NCBE Conference in 1933, the former Chairman of the ABA's section on Legal Education and Admission stated:

> "sometimes you have wonderful character evidence displayed even though the applicant is not well educated or his parents were born in Russia."[8]

In the 1920s the ABA's Section of Legal Education and Admissions, began its' quest to control admission standards. The rise of the ABA's Bar Admission Section unsurprisingly paralleled the rise of their UPL Section (Unauthorized Practice of Law). In 1928, Pennsylvania led the way by implementing a registration system under which prospective Bar candidates would face a character investigation at the beginning of law school and when applying for admission. This illegitimate process was subsequently adopted by other states, but admirably abandoned by Pennsylvania. The character interview under the law student registration program was used to dissuade the purportedly "unworthy" from pursuing a legal career. Pennsylvania's definition of "unworthy" was quite elastic. Those rejected in 1929 included individuals deemed "dull," "colorless," "subnormal," "shifty," "smooth," "arrogant," "conceited," and "slovenly." A substantial number of candidates reportedly lacked a "proper sense of right and wrong," others had not "moral or intellectual stamina," appreciation of "social duty," or "well-defined ideas on religion."[9]

I detract now a bit. I am currently a member of the Pennsylvania Bar. The foregoing information found in Professor Deborah Rhode's historic article, *Moral Character as a Professional Credential* was published in 1985. Professor Rhode is a law professor at Stanford Law School. Her ideas in this area, as well as her concepts related to UPL (Unauthorized Practice of Law) guide my own to a large degree.[10, 11] She has essentially been the foremost authority, (until me) regarding these subjects. I applied for admission to the Pennsylvania Bar in 1995. At that time, Pennsylvania's character questionnaire was the least cumbersome of all the State Bars, although it still included several unconstitutional inquiries. I know this because I requested applications from every single State Bar in the nation. The early issues of the Bar Examiner magazine from the 1930s, refer often to the "admirable" character review process of the Pennsylvania Bar. Pennsylvania was the nation's leader in restricting Bar admissions, and then took the commendable step of diametrically reversing course. For the most part, they abandoned their irrational admission program. They went from being the most unconstitutional State Bar in the early 1930s, to perhaps the fairest in the nation currently.

I graduated from law school in 1994. During my last semester, a flyer was handed out to students indicating that law student character registration would probably be implemented for all new students. Since then, the concept has gained steam in many states. Many law schools and some State Bars began requiring law student registration again in the 1990s. This demonstrates how the legal profession's unjust, self-interested concepts which drove the admissions process to become more stringent in the 1930s are still flourishing today at the expense of the general public.

In 1993, the ABA published a pamphlet titled, "The ABAs First Section - Assuring a Qualified Bar", by Susan K. Boyd. It discussed the early years of the Bar Admission Section. It recognized that the legal profession throughout the early 1900s was particularly concerned about the economic effect the influx of immigrants was having on the profession and seeking ways to exclude them. The ABA's 1993 pamphlet discusses how in 1915, future ABA president Walter George Smith of Pennsylvania stated at the meeting of the Legal Education section :

> "We have in the Eastern cities representatives of the most ancient race of which we have knowledge coming up to be admitted to the practice of law. . . . those men who have come to the Bar without the incalculable advantage of having been brought up in the American family life, can hardly be taught the ethics of the profession as adequately as we would desire."[12]

The 1993 ABA pamphlet also recognized that bigotry and prejudice permeated the Bar and law school world. It acknowledged that there was egregious discrimination against African-Americans, Jews, Catholics, Immigrants and Women. The importance of the information source for these concessions is as follows. During the expansion period of the Bar Admission Section in the 1920s, 1930s, and 1940s, the ABA utilized false propaganda stressing that the reason for curtailing State Bar admissions was to protect the public. Essentially, the ABA wanted to fool the public into believing the purpose of these Sections was not to enhance the economic interests of the legal profession, but instead to protect citizens from dishonest and incompetent Nonattorneys. The publication of the 1993 pamphlet by the ABA demonstrates the ABA appears ready to concede such. Their recent "confession," supports the premise that admission restrictions were originally designed for anticompetitive purposes. They were not designed or ever used to protect the public from incompetent attorneys, as the ABA falsely led the public to believe for so many years. In order to demonstrate in today's world that the restrictions serve the primary purpose of protecting the public, the legal profession would logically need to show some intervening factor which negates the original intent. To my knowledge, no intervening factor exists.

The National Conference of Bar Examiners held its first meeting on September 16, 1931. It began publishing a magazine titled "The Bar Examiner" which is still published today. Most members of the public don't even know these committees exist or what they have done to monopolize the delivery of legal services. The monopoly allows incompetent attorneys who support the profession's economic interests to profit when litigants go to prison, parents lose custody of their children, families lose their property, litigants lose civil cases, etc.. The concept from the State Bar's perspective is, "lawyers first, the public second, if at all." Here are some interesting quotes from an article titled "Attorney Fees and Costs" written by Oregon attorney, Paul Saucy, circa 1992-1994. The article was published by the Oregon State Bar in Chapter 6 of a Continuing Legal Education Manual designed to be read by Oregon attorneys. How the Oregon State Bar could be so stupid as to publish these concepts and promote such within the context of continuing education is beyond me. The Oregon State Bar manual written for Oregon attorneys reads :

> "Remember how much more important it is to feed and clothe your family than it is to help a client with her particular problem."
>
> "If you feel awkward about withdrawing, dictate the withdrawal papers while looking at that photograph of your family on your desk."
>
> "One suggestion is to place a photograph of your family on your desk in plain sight so that each time you think about how large the client's retainer should be your gaze will fall upon your family."
>
> "Note that I also provide for an increase in my hourly rate without prior notice to the client."[13]

In 1996, I realized that the NCBE's magazine, "The Bar Examiner" was the cornerstone in conjunction with the ABA's Legal Education and Bar Admissions Section, and its' UPL committee, to the State Bar's economic protectionism. I wanted to read prior issues of the magazine. Past issues were

in law school libraries. The magazine was not however, carried by any public libraries that I looked into. I was living in New Jersey and quickly learned that to be allowed admittance into most of the law school libraries in the area, all I needed to do was present my Bar card showing that I was a licensed attorney. I did so numerous times at the Seton Hall Law Library. Each time I did it, a certain thought process went through my mind. It was simple in nature and as follows. If I were not a licensed attorney, then I would not be able to gain access to this magazine. I am constantly saddened by the thought that law schools which are in large part funded by students paying tuition with student loans guaranteed by the federal government, exclude the general public from using their facilities. So there I was, reading issues of the "Bar Examiner" dating back to the early 1930's, spending 10 cents per sheet to photocopy virtually every single applicable article on the issue of character from 1931-1946. Crinkled old books with yellowed pages that revealed the diabolical foundation of our nation's legal profession in the 20th century. No one in the law school library even gave me a second thought, or could have cared less about what I was researching. But I felt that I was on to the hottest find of the century.

The foregoing paragraph was intended to be the end of this short chapter, but something interesting occurred subsequently. In January, 2001 I went back to the Seton Hall Law Library to do some research. Although I was virtually certain that I had photocopied the most pertinent articles of the Bar Examiner magazine, I decided to take another look to see if I missed anything. But, they were gone. The library maintained virtually all other dated information including appellate opinions from certain states dating back to the early 1800s. The Bar Examiner magazine however, had been taken off the shelf. I went to the computer index catalog and discovered that the "Bar Examiner" had been transferred to microfiche, with one significant exception. The microfiche only included issues of the magazine going back to 1980. Everything else from the early 1930s through 1979 was apparently now unavailable. The most pertinent and incriminating articles ever written about the legal profession, by those who control the profession itself, seemed to be no longer available for research at all. Previously, to gain access to the old Bar Examiner articles, I had to be an attorney and show my Bar card. Now, it seemed that no one could gain access to them. As will be demonstrated herein, the profession's concern about those articles is well-warranted. The State Bars don't want the public to know what is in those old articles that form the foundation of the Bar admission process. But I got them. When you read Chapter 15 of this book, you will truly be shocked at what the irrational supporters of the State Bar monopoly wrote in the 1930s and 1940s.

7

STATE BAR "PLEASANTVILLE"

Just a few years ago, there was a movie released called "Pleasantville." The movie is about two teenage kids living in the 1990s who are transported into a television show from the 1950s called "Pleasantville." The TV show into which they are transported depicts what is supposed to be the perfect American family in the perfect American town. Husband, wife, son, and daughter living in a town where everybody is happy all the time and everyone always gets along. When they are first transported, everyone and everything in the town is in black and white, without any colors, as one would expect in a television show from the 1950s.

The teenagers, being from the 1990s ultimately change things immensely in the town. As they teach the people of the town to develop and discover their passions, the people develop skin tones, and things around them such as flowers and automobiles develop colors. Certain people of the town however, don't like the changes that are occurring and view the teenagers as a social threat to the "pleasant," "civil" and respectful atmosphere that previously existed, where everyone is always nice and happy. Significant friction between those citizens of passion and the ones that wish to retain the status quo, ultimately erupts into violence. It quickly becomes apparent that beneath the "civility," and "pleasantness" of those opposing any type of change, are deeply rooted feelings of hatred and ruthlessness.

The movie reminds me of how State Bars regulate the nation's legal profession. As you read through this book, it will become readily apparent that the State Bars are continually stressing the need for civility, respect, good moral character, professionalism and honesty. They want all the lawyers to get along with each other, so that everything is "nice" and "civil." Anyone however, who questions the manner in which they proceed, is quickly, severely and ruthlessly punished. Any lawyer who zealously and bravely litigates like a true fighter is falsely deemed to be uncivil or unprofessional. Their favorite phrase for such lawyers is that they engaged in "conduct prejudicial to the administration of justice." The point is that the State Bars are wholly unconcerned about whether a lawyer fails to zealously represent a client, so long as that lawyer fosters the economic interests of the profession.

The same Judges and lawyers who insist on "civility" and "professionalism," will not hesitate to deprive a litigant of their constitutional rights thereby causing an innocent person to be put in prison. They will not hesitate to allow a guilty person go free notwithstanding the pain and anguish caused to a victim, if it furthers the economic interests of the legal profession. Their focus in every case is not on victim's rights, defendant's rights, women's rights, men's rights or children's rights. Rather, their focus in each case is how any particular issue affects the State Bar's power and economic interests.

Beneath the Puritan-like, inflexible State Bar disingenuous labels of "good moral character," "honesty," "civility," "professionalism," and "truthfulness," is a deep hatred, coldness, and dispassionate lack of a true concern for the quality of representation given to litigants. Essentially, the concept is to let the litigants lose their homes, children, freedom, and possessions, so long as the cohesive unity of the legal profession is maintained, by fostering an irrational definition of what constitutes professionalism," "civility" and "good moral character." It's a State Bar Pleasantville.

8

THE IMPORTANCE OF THE RULE OF LAW

There is nothing more essential to society than the rule of law. If there is no rule of law, then people do what they please. This inevitably results in rule of the strong over the weak, without regard to fairness or justice. I am an ardent and firm believer in the necessity for the rule of law. The State Bars similarly stress continuously, (for purposes of "wise publicity") the importance of the rule of law.

The place where the State Bars and myself depart, is that I believe the rule of law applies equally to those in charge of regulating the legal profession. The State Bars prefer to irrationally claim exemptions from constitutional principles of law, through a manipulative use of logic and interpretation. This I have determined to be wholly unacceptable and in fact, a violation of the rule of law itself, which reflects adversely upon the moral character of the Bar.

It will be demonstrated herein, that the Bars interpret rules hyper-strictly against Applicants, since to do so fosters State Bar economic interests. This would not be entirely objectionable if the State Bars were also subjected to hyper-strict application of the rules. What they do however, is when the issue of applying rules to their organization is presented, they assert the need for a liberality in construction of rules, since such is also to their economic advantage. Ultimately, what society is left with, are rules applied strictly to everyone except the State Bar.

It has been an unfortunate predicate throughout history that when rules are broken, they tend to be broken in favor of the strong, rather than the weak The entire concept of enacting rules in any society, in any sports game, or market, is to equalize the playing field. By having rules, everyone is supposed to know the manner in which a given event or controversy will be played or handled. By having rules within the context of litigation, the goal is to equalize the rich with the poor, the strong with the weak, those who know powerful people with those who don't know powerful people. The intended concept is that by having rules no one should be able to gain an unfair advantage by doing things in an informal manner.

The dichotomy between liberal and strict interpretation of rules to fit self-interested goals has its basis in the related dichotomies of procedure versus substance, and rules versus standards. I present a hypothetical example for analysis. Let us presume a requirement exists to "file" a certain document within five days. That would be a rule. The rule is designed to foster the provision of "Notice" to another party in a timely manner. "Notice" therefore, would be a standard. Rules are designed to promote standards. The difficulties arise when a particular rule, due to the circumstances of a case, functions in an unjust manner. In the hope of solving such dilemmas, rules are therefore subject to interpretation.

In our foregoing example, a common interpretation might be as follows. A document must be "filed" within five days, unless a party demonstrates "reasonable cause" for missing the deadline. One problem is solved and another is created. The dilemma created is determining what constitutes "reasonable cause." Whether "reasonable cause" exists has now become the determinative factor as to whether the five day deadline should be applied. This now brings our hypothetical to the dichotomy of procedure versus substance. Procedure takes precedence over substance when a particular rule is applied in a given case, even though application of the rule may cause an unjust result. Substance takes precedence over procedure when a rule is not applied, because the result of applying the rule would be unjust. So perhaps the answer is easy, you think ? Simply apply the rule when to do so is "just." That

however, creates a brand new problem. The "rule" has ceased to be a rule and has instead become a "conditional rule."

What if the rule is always applied to the weak, but the decision-makers consistently determine that "reasonable cause" exists when those who are strong do not comply with the rule? Essentially, the weak are then always subjected to the rule, but the strong are always exempted from it. In such an instance, there is no doubt that procedure takes precedence over substance with respect to the weak. Procedure does not take precedence over substance with respect to the strong. Nor for that matter, does substance take precedence over procedure with respect to the strong since the rule is being applied inequitably. The most basic standard of all, "Justice" has been violated. The strong are simply benefiting from a blanket exemption to the rule.

When this occurs, the rule that was originally designed to implement "justice," has instead become the exact tool used to cause "injustice." Originally intended to equalize the playing field, the rule has become the implement used to rig the playing field. By allowing State Bars to apply rules hyper-strictly to people other than themselves, but leniently when their own interests are at stake, the rule of law is broken. It is irrefutably a significant step towards condoning the detestable principle that the strong should rule the weak.

9

THE U.S. SUPREME COURT HAS BEEN WAITING FOR THIS CASE

Judges loves cases dealing with legislative or executive power. They love to sit in judgment of another branch of government and render the final determination of the proper scope of another branch of government's power. Judges will not hesitate to hear cases dealing with murder, robbery, extortion, rape, personal injuries, defective products, environmental claims, police conduct, abortion, religion, political funding, children, education and virtually every other single category that a person can imagine. There is one glaring exception. Judges detest cases addressing the proper scope of judicial power and State Bar authority. That needs to change.

If the Judiciary is going to continue to regulate the practice of law in form, then it must begin to do so aggressively as a matter of substance, and with a keen concern for constitutional freedoms which are in fact applicable to the Judiciary just like everyone else. The power to interpret law does not carry with it a general exemption from the law. Contrary to what the hypocritical State Bars believe, when I became a member of the Pennsylvania and District of Columbia Bars, I did not check my First Amendment rights at the door.

It has now been approximately thirty years since the U.S. Supreme Court rendered its' 5-4 decisions *in* *Baird*, *Stolar* and *Wadmond* on the exact same day (those cases are discussed later herein). Those opinions read in conjunction with each other established nothing. They simply demonstrated that the Court did not know how to deal with the issue. The Court ruled in favor of the Applicants in *Baird* and *Stolar*, and in favor of the Bar in *Wadmond*, with Justice Potter Stewart being the swing vote in all three cases. All of the Bar admission cases that have addressed the moral character issue, including *Willner*, *Anastaplo*, *Konigsberg I*, *Konigsberg II*, and *Schware* focused on the First Amendment and freedom of expression. The heart and soul of the issue however, is really the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court has never directly addressed that issue. And it is the weak spot. The pronest point of vulnerability. It is the Achilles Heel, so to speak, because to rule in favor of the Bar, requires the Court in a high profile case to somehow convince the general public that allowing licensed attorneys and Judges to be held a lower standard of moral conduct than Nonattorney Bar applicants is a good idea. No matter how such an opinion were written, the public will never buy into it. It is time for the U.S. Supreme Court to take a decisive stand. They must stand with the general public, or it will be clearly known that they stand with the State Bars.

I have an absolutely perfect fact set for this case, which I have spent almost a decade building. I have already passed the character review process of two Bars. I gained admission even after presenting the most derogatory information about myself and without being required to attend a personal interview. Stated simply, I outplayed the Bar admissions process. I have never been professionally disciplined and never had even one single ethical complaint of any nature ever filed against him. I am currently the most knowledgeable person in the entire nation regarding the State Bar admissions process. I have no current intention of degrading myself by actually engaging in the practice of law, and now simply seek to reform the admissions process for the purpose of improving the nation's legal profession. It's a perfect fact set by the Ultimate Backdoor Applicant. I snuck in the backdoor, and now I'm going to open the front door.

I believe the U.S. Supreme Court wants to remedy this situation, and further believe their opinions over the last two decades have been slowly setting the groundwork in place. They have been waiting however, for the right litigant with the right fact set to come along. I am that individual. I have complete faith and confidence that the U.S. Supreme Court will ultimately rule in favor of the general public on this critically important issue which affects every single other litigation in this country.

The U.S. Supreme Court has been waiting for this case, or they are simply afraid of it.

10

THE STATE BAR'S SO-CALLED "GOOD MORAL CHARACTER" STANDARD HAS BEEN A COMPLETE, TOTAL, ABJECT FAILURE

It has been approximately 70 years since the National Conference of Bar Examiners had its first meeting. The purpose for adopting irrational character standards was delineated in their magazine "The Bar Examiner." It was to enhance the economic interests of the profession, while simultaneously promoting racism. In 1957, the U.S. Supreme Court responding to the pervasive McCarthyism which still thrives in the State Bars today, recognized the danger to American values presented by the so-called "good moral character" standard and dealt a major blow to its legitimacy stating :

> *"It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."*
>
> Konigsberg v. State Bar of California, 353 U.S. 252 (1957)

The operative phrase is "dangerous instrument." The U.S. Supreme Court was issuing a stern warning to the State Bars. The Court was making it clear that if the power given to the Bars was abused, it would be taken away. The State Bars foolishly failed to heed the warning. They did precisely and exactly what the Court warned them not to do. They used the "good moral character" standard as their fulcrum for arbitrary denial of a law license when faced with an Applicant who does not support their financial interests, or irrational political and societal beliefs. Applicants are regularly denied admission by ludicrous Bar Committees for being glib, facetious, arrogant, flippant, and a wide host of other mere personality traits on the false ground that such demonstrated they lacked "good moral character." The best evidence of the complete, total, abject failure of the "good moral character" standard however, rests in the opinions of the general public. Since the NCBE's inception the public's view of attorneys has not improved in the slightest degree. The typical Nonattorney American justifiably regards lawyers as deceptive, slimy, cheats, crooks, and scoundrels. It is by far the worst regarded profession in the nation, even though no other profession has adopted such irrational character standards. Doctors, engineers, accountants, architects, and in fact even used car salesmen are all better regarded by the general public than attorneys. No profession is viewed more contemptibly than the legal profession. That alone demonstrates the complete, total, abject failure of the so-called "good moral character" standard.

Appellate opinions consistently falsely characterize the legal profession as a “learned profession,” a “time-honored profession,” and a “respectable profession.” They fail the State Bar's "good moral character" standard in doing so, since such false assertions fail to disclose the true nature of the profession. The legal profession has historically never been respected. At best, it is a necessary evil that society requires to function. It is often compared to prostitution and not even viewed as favorably as that also "time-honored" profession. Even those individuals such as myself, who pass the character review without the need for a personal interview are embittered by the process and resent having been required to divulge highly personal information to the State Bar. The State Bars have in fact alienated their only possible supporters. The attorneys. It's been a failure.

11

HOW THE STATE BAR ADMISSIONS PROCESS REALLY WORKS

The reader will no doubt find this section, nothing less than shocking. The State Bar admissions process functions in reliance on a rudimentary premise which is as follows. The State Bars WANT every single Applicant to file an application that contains some false, misleading or incomplete information. You may ask, why would they desire such? What possible incentive could the State Bars have for WANTING all Applicants to submit an application containing false, misleading or incomplete information. The reason is as follows. Once the Applicant submits any false, misleading or incomplete information in response to an inquiry, the State Bar acquires the power to deny admission. The accumulation of power is what the State Bars are all about. Hypothetically, if it were even possible for an individual to submit an absolutely truthful application, and that application contained no adverse character information, the State Bar would LACK the power to deny admission. A fair, just and rational application form is therefore inimical to the State Bar goal of accumulating power. There is a strong correlation between increasing the power of State Bars to select their own members, and maximizing the probability that every single Applicant files an application containing some false, misleading or incomplete information. Once the State Bar acquires the power to deny admission, they can exercise that power by admitting Applicants who they subjectively like, and deny admission to Applicants they subjectively dislike. The power they have acquired, is a Power to Exercise Arbitrary Discretion in rendering the admissions decision.

Now the second question. How does the State Bar accomplish its goal of maximizing the probability that all Applicants submit an application containing false, misleading or incomplete information? The answer is actually simple. All the State Bar has to do is to formulate an application form that is logistically impossible for any human being to complete in an absolutely truthful manner. This is accomplished by utilization of varying State Bar techniques in drafting the application questions. The basic categories of questions used to accomplish the State Bar's goals are as follows:

1. QUESTIONS REQUIRING THE APPLICANT TO RECALL EVENTS REMOTE IN TIME, STRETCHING BACK MANY YEARS; SINCE THE PROBABILITY OF ONE RECOLLECTING INCORRECTLY INCREASES AS THE PERIOD OF TIME BETWEEN RECOLLECTING AN EVENT AND THE EVENT'S OCCURRENCE LENGTHENS

2. QUESTIONS REQUIRING THE APPLICANT TO PROVIDE TOO MUCH DETAIL, SINCE THE MORE DETAIL THAT IS REQUIRED, THE GREATER IS THE PROBABILITY SOME DETAIL WILL BE OMITTED

3. QUESTIONS THAT ARE VAGUE OR AMBIGUOUS DESIGNED TO CREATE UNCERTAINTY AS TO WHAT INFORMATION IS REQUIRED; SINCE THIS ALLOWS THE BAR TO INTERPRET THE QUESTION'S SCOPE SUBSEQUENT TO SUBMISSION OF THE ANSWER

4. QUESTIONS THAT ARE HIGHLY PERSONAL IN NATURE; SINCE THE APPLICANT HAS AN INCENTIVE TO NOT DISCLOSE EMBARRASSING PERSONAL INFORMATION

5. A CATCH-ALL QUESTION FOR THOSE APPLICANTS NOT CAUGHT BY (1) - (4) above.

The first four question types above, which are utilized by the State Bars to accomplish their goal can be summarized as follows. Questions focusing on Time, Detail, Vagueness and Personal information. By asking questions that require the Applicant to dig deep back into their memory over a long period of years, provide extensive detail with respect to matters that are far remote in time, respond to vague inquiries and provide extensive personal information, the State Bars generally succeed in achieving the goal that Applicants submit false, misleading or incomplete information. The remaining small percentage of Applicants who are not successfully subjugated by the foregoing tactics are ultimately entrapped by the final "catch-all" question. The catch-all question makes the following type of inquiry of the Bar Applicant :

> **"Is there any other incident(s) or occurrence(s) in your life, which is not otherwise referred to in this application, which has bearing, either directly or indirectly, upon your character and fitness for admission to the Bar?"**

It is a question that no human being on this earth, could possibly answer truthfully, accurately, and completely. The catch-all question ensures the State Bar that every single Applicant will submit an application form containing at least some false, misleading or incomplete disclosure. The Bar admissions process is irrefutably one of the last remaining vestiges of McCarthyism in this country. The manner in which the admissions process functions is almost identical to how the congressional committees investigating communism functioned during the McCarthy era. It has been summarized as follows :

> "The committee delighted in entrapment. Arnold explained : "The policy of the McCarran Committee is first to have the witness in secret session, get him to testify to the best of his recollection as to events from five to ten years ago, then bring him on at a public hearing, ask him if he did not so testify at the secret session and then give him some letter to which he has not previously been given access which shows that he is wrong. This then is branded as an untruth." According to Arnold, the committee "long ago gave up all idea of proving <name> was a Communist. Instead they spend weeks of time in trying to catch him up in contradictions and give the impression that he is an evasive and untruthful witness." Predictably . . . <name> was indicted for perjury."[14]

That is essentially the State Bar admissions process in a nutshell.

12

THE INVERSE RELATIONSHIP BETWEEN UPL AND STATE BAR ADMISSION STANDARDS

Imagine your spouse, son, daughter, close relative or good friend has just been arrested for a crime they did not commit. You go to visit them in jail and they ask you what to do. You ask them whether they committed the crime for which they are accused. They say "No," and you believe them. You tell them when they appear in front of the Judge, to enter a plea of "Not Guilty." As you exit the County jail in which they are being held, a state official comes up to you, hands you court documents and says you will have to appear before a Judge to defend yourself against the charge of engaging in the unauthorized practice of law for providing legal advice without a license which carries a possible prison term of two years. Sound farfetched ? It's not as much as you think.

It's called the Unauthorized Practice of Law (UPL) and generally speaking, what it means is that if you perform legal services which includes the rendering of legal advice without having a law license you are subject to applicable penalties. Those penalties vary from one state to another, as will the manner in which the State proceeds against you in its' discretion. UPL is almost always enforced on a selective rather than uniform basis, and can be characterized by an improper use of discretion. It is normally enforced only against those who represent an economic threat to the monetary earnings of lawyers. This being the case, there is no competitive advantage to the State Bar to charge an individual in the foregoing hypothetical. Notwithstanding, if UPL rules were applied uniformly, the foregoing scenario would result in charges being imposed against literally millions of caring family members and friends. It is therefore obvious that if UPL rules and laws were applied uniformly, the general public would be absolutely outraged and the prohibitions would be unsustainable. For this reason, they are the profession's weakness. Its' Achilles Heel, since they are only sustainable when selectively enforced. This is notwithstanding the fact that States are purportedly duty bound to enforce laws on a uniform basis, regardless of who violates them.

Let's now change the hypothetical. The same basic fact set with the following change. In addition, to advising your loved one to plead Not Guilty, you tell them you will attend the arraignment (the court appearance where they enter their plea), for moral support. You sit in the back of the courtroom which is relatively empty. The Judge asks the Defendant what their plea is. The Defendant turns around to you and asks, "Is this when I say Not Guilty?" You nod your head, “Yes.” Your chances of being charged with UPL have now dramatically increased.

Let's change the hypothetical again. Your family member or friend has called you because they know you are an attorney. The problem is that you are a lawyer in a neighboring State (we'll call it State #2) and the person you care about has been arrested and charged in State #1. You provide the exact same legal advice at the county jail, and the same nod of the head in the courtroom. Your chances of being charged with UPL have now increased, to the point where if the Judge informs the State Bar of what occurred, you would probably be charged with UPL. This is notwithstanding the fact that as a licensed Attorney in State #2, you supposedly have more legal knowledge than in the hypothetical where you were a Nonattorney. This is because as a lawyer in State #2, you represent a substantial economic threat to lawyers in State #1. They have lost legal fees to the extent of the advice you rendered. Stated

simply, the higher the probability is that a person is competent to render legal services, the greater is their chance of being charged with UPL.

In all three hypotheticals, you engaged in conduct that probably constitutes a UPL violation. It is only in the third fact set however, where you represent a substantial economic threat to attorneys. As a result, that is probably the only situation where you would be charged. The incredible irony, is that the third fact set is where you can probably offer the most competent and valuable assistance to your loved one or friend. Here are some additional examples of conduct that probably meets the ambiguous definition of UPL, even though due to selective enforcement you might not be charged :

1. Your loved one is being arrested, and you yell out, "tell the police officer you're exercising your right to remain silent."

2. Your loved one has charges pending against them and has been released pending trial. You write them a letter describing a similar case where the Defendant was acquitted and enclose a copy of the published court opinion.

3. Your loved one is buying a house and you explain how the courts have interpreted certain mortgage and financing laws.

4. You inform a loved one how to fight a parking ticket in court. Who hasn't done that ? In fact, if you do such a good job that you decide to help out everyone in your neighborhood and then charge $ 1.00 for each person you assist, it's almost guaranteed the State Bar will come after you if they find out.

5. You explain to your 78 year old grandmother about the tax law ramifications of accepting a lump sum distribution from a pension plan, in exchange for her baking you a dozen cookies.

6. You write up a contract for your brother to buy your sister's house.

7. You draft a letter on behalf of your invalid mother to send to the credit card company that is harassing her for payment, and your letter states that the credit card company is in violation of the Fair Debt Collection Practices act.

8. You explain to a loved one or friend how any aspect of the law functions because you want to help them out in dealing with some type of legal situation.

The problem with selective enforcement of UPL prohibitions is that when any law is selectively enforced, it results in a general loss of public faith and confidence in the legal system. Once selective enforcement becomes the norm, the determinative issue shifts from whether one violated the law, to whether they should be prosecuted for violating it. The general argument made by the violator is that they should receive the benefit of an exception, since someone else got an exception. There are then no longer any rules we can rely on to govern our conduct. This problem is further exacerbated in the case of UPL, because most Courts and State Bars prefer to leave the definition of precisely what constitutes UPL as ambiguous, vague and uncertain. That way they can let anyone off the hook who does not pose an economic threat to the Bar and attack with vehemence anyone who does. Essentially the diabolical brilliance of the UPL schema creates a situation where discretion and selective enforcement is exercised based on unconstitutional motivations. It results in promoting the self-serving economic and political interests of attorneys, which effectively compromises the legitimacy of the justice system. It is a dual problem. The mere existence of too much discretion promotes a lack of fairness in applying the law,

and the problem is exacerbated by the improper manner in which discretion is exercised. Implementation of the UPL weapon has therefore contributed significantly to creating a general public perception of inequality and unfairness in the law.

Now let's look at the issue from the other side. Selective enforcement can accomplish a public good in isolated cases. I'll provide an example. Every now and then there is an individual charged with some type of crime who has a great deal of public support. The public believes the person did nothing wrong from a moral perspective, even though technically they violated the law. In such situations, the public believes that Prosecutors are committing an injustice by pursuing a conviction. Prosecutors often respond to public outcries of injustice in such situations, by issuing a statement to the effect of, "the law is the law and must be enforced against anyone who violates it." When they do so, they are making a false representation to the public. The reason is as follows. It is irrefutable that our law provides prosecutors with discretion in deciding who to charge with a particular crime. They are under no legal obligation to proceed with prosecution in any instance. Every time I hear about a prosecutor issuing the statement "the law is the law and is enforced against everyone equally no matter who they are," I can not help but wonder whether they really expect members of the public to believe them.

Although the law provides discretion for prosecutors, judges and State Bars, it is critical that discretion be exercised fairly and justly. In accordance with such, the scope of discretion should be narrowly confined. Due to the danger caused by the unfair exercise of discretion, it should be kept narrow in scope. When the limits of discretion become too ambiguous or the scope of discretion too wide, the law becomes predicated on pure favoritism. For the most part, subject to few isolated exceptions, selective enforcement which is typically characterized by the improper use of discretion will result in a diminution of faith and confidence in the legal system by the public.

Regardless of how wide a person asserts the proper scope of discretion should be, and regardless of whether a person is in favor of, or against selective enforcement, two points are irrefutable. First, discretion is provided for in the law. Second, selective enforcement typified by the improper use of discretion, characterizes the current UPL framework of State Bars. UPL prohibitions would collapse in their entirety if they were enforced on a uniform basis. The unprosecuted commission of UPL in this nation, is probably exceeded in scope only by parking violations. Everybody helps out family members and friends when they can. UPL prohibitions are sustainable only in reliance on selective enforcement.

The scope of what constitutes UPL varies from state to state, but generally speaking it is defined as the provision of "legal services." That's not much help though, since it then has to be determined what constitutes a "legal service?" "Legal services" are generally defined as the rendering of "legal advice" or the preparation of "legal documents." That's not much help either though, because the next obvious question is what constitutes a "legal document" or "legal advice?" No clear cut answers exist. Courts have wrestled with this dilemma since the 1930s. Their inability to arrive at a universally accepted definition has been one of the greatest problems in UPL prosecutions.

Can you imagine if everyone who rendered the ambiguous unknown of "legal advice" were charged with UPL? It happens so many times in common everyday situations that the number of prosecutions would be absolutely unmanageable. From a moral perspective, what category of individuals should be charged? The question itself is unsettling to those who believe the "law is the law and should be applied equally to everyone." Consider the following four categories of people performing legal services:

1. People **without a knowledge of the law** who perform legal services **for free.**
2. People **without a knowledge of the law** who perform legal services **as a business.**
3. People **possessing knowledge of the law** who perform legal services **for free.**
4. People **possessing knowledge of the law** who perform legal services **as a business.**

Initially, I work from the premise that the distinction between those possessing knowledge and those without knowledge is not predicated on whether they have a law license. Stated simply, there are many licensed attorneys who are Dumb, and many Nonattorneys who are extremely knowledgeable and proficient in the law. The determinant factor is actual legal knowledge, not state recognition of legal skills by virtue of licensure. Now, which of the above categories from a moral perspective should result in a UPL prosecution?

The answer seems obvious initially, but is not as easy as it seems. The initial inclination is to suggest that society is best off, if people in categories (1) & (2) are charged with UPL, and those in (3) & (4) are not. After all, the people in (1) and (2) lack knowledge in the law. I raise no issue with charging those in category (2), but a significant dilemma exists regarding category (1). The problem is that most family member and close friend hypotheticals fall squarely into category (1). Prosecuting those in category (1) cuts directly into the moral importance our society places on helping those we love and care about it to the best of our ability. Essentially, we tend to believe that we should do the best we can to help friends and family even if we lack knowledge in a subject area. On the other hand, condoning the provision of legal services by those who are incompetent would also seem to be wrong, thereby suggesting that people in category (1) should be charged. Which of the two has a more detrimental impact? Prosecuting family members with UPL for helping those they love, or condoning the provision of legal services by individuals who are not skilled? Either way, it's a no win situation.

Categories (3) and (4) pose an entirely different problem. Assuming the people in categories (3) and (4) are honest, logic would suggest that they should not be charged with a UPL violation because they possess legal knowledge and can help people. The problem however, is that not all people in categories (3) and (4) are licensed attorneys. There are many people in categories (3) and (4) who technically are in violation of UPL prohibitions. Although logic suggests that people in categories (3) and (4) should not be charged with UPL violations since they possess legal knowledge, they are at the greatest risk of being charged.

The legal actuality therefore, does not promote the societal interest. Competent individuals providing valuable legal services are the specific targets of UPL prosecutions. The result is that the goal of reconciling society's best interest with the legal actuality is not achieved. Remember, any Nonattorney in any one of the above four categories has engaged in UPL. They will not all be pursued however. The State Bar will not focus on category (1) individuals since it would be a public relations nightmare. They will focus on category (3) and (4) individuals who are unlicensed, and yet those people are the ones who actually possess legal knowledge. The end result is that currently, UPL enforcement has been an abject failure in attaining the societal good. Competent Nonattorneys in categories (3) and (4) are pursued, while incompetent Nonattorneys in category (1) are allowed to continue. I raise the category (1) dilemma primarily for the purpose of demonstrating its' inconsistency with category (3) and (4) prosecutions, not for the purpose of suggesting that the solution is to prosecute loved ones in a category (1) scenario.

The enforcement of UPL prohibitions can have two effects. To the extent incompetent individuals are excluded from providing legal services, society benefits and the legal profession benefits since its' competition has been eliminated. To the extent competent individuals are excluded from providing legal services, society is harmed, but the legal profession still benefits because its' competition has been reduced. Essentially, whether UPL is enforced against a competent or an incompetent individual, the legal profession always benefits. Such being the case, the State Bars have economic incentives to maximize UPL enforcement whether society benefits or is harmed.

The financial incentives for State Bars to maximize UPL enforcement, mandates that the Bar's UPL policy be critically examined. It is similar in nature to a government official who holds common stock in a corporation that submits a construction bid for a project. To the extent the official has decision-making authority regarding who is awarded the contract, their actions must be viewed suspiciously, since they will personally profit if their corporation obtains the award. This is not to

suggest that all UPL enforcement activities are engaged in solely for the purpose of increasing lawyer profits, nor is it to suggest that government officials who award construction contracts to companies they own do so solely to profit personally. Any specific, isolated UPL enforcement activity has the possibility of achieving a public good, just like the corporation that is owned by the government official may actually do a better job at a better price than the competition. It is simply to assert that the close nexus between UPL enforcement, and the economic incentives for lawyers to reduce their competition mandates a critical examination of State Bar policy. Certainly, any State Bar self-serving pronouncements regarding UPL can not be accepted at face value and should for the most part be disregarded.

The primary propaganda argument used by State Bars to support UPL enforcement is that the Nonattorney's legal services are incompetent. In assessing the legitimacy of this assertion, it is critical to examine whether Nonattorneys are being held to a higher standard of proficiency by Courts compared to licensed attorneys. It is well known that procedural errors made by attorneys are often forgiven by the same trial court judges who penalize Nonattorneys making an identical error. It's known in technical legal terms as an "invidious application of the procedure-substance dichotomy." This issue is one of the most critical because in a typical UPL enforcement action the State Bar adopts the posture that not only was the service performed prohibited, but the advice given was wrong or the legal document prepared contained errors. The flaw in this argument is that licensed attorneys regularly provide incorrect legal advice and regularly prepare legal documents containing errors. Essentially, the degree of incompetency that typically characterizes a licensed attorney diffuses the legitimacy of the standard "wrong advice" or "errors in the documents" declaration adopted by State Bar UPL committees.

The opportunity for a Court to construe issues of procedure stringently against Nonattorneys and leniently with respect to licensed attorneys, coupled with the economic incentive to exclude Nonattorneys, raises further concerns about the sincerity of State Bar propaganda that aggressive UPL enforcement protects the public. Even if we assume for argument sake that issues of procedure versus substance are not applied unfairly against the Nonattorney, the State Bar's position is infirm. The reason is remarkably simple. In virtually every instance where a licensed Attorney files a legal motion with a Court, which is opposed by another licensed Attorney, one Party wins and the other loses. Presumably, the losing party was legally wrong since two licensed Attorneys presenting diametrically opposed legal positions can not both be right. It's an absolute impossibility. Consequently, it must be concluded that the Attorney representing the losing party asserted an erroneous legal position and/or submitted an erroneous legal document and/or rendered incorrect legal advice. Thus, if the provision of incorrect legal advice or preparation of erroneous legal documents constitutes grounds for precluding someone from providing legal services, there are millions of licensed attorneys who should be excluded from the practice of law. In fact, since one would be hard pressed to find a trial lawyer who has not at one time lost a motion or case, a solid assertion could be made that they should all be excluded from practice.

Turning to another subject now, if you are charged with engaging in the Unauthorized Practice of Law, who do you hire to defend you? Defending an individual against a UPL action constitutes the practice of law. So you need to hire a licensed attorney. This creates monumental ethical dilemmas, since any attorney representing you, will be torn between his loyalty to you as a client and his conflicting loyalty to the economic interests of the State Bar, which notably has the power to revoke his law license.

Consider the following hypothetical. You have just helped your crippled sister prepare legal documents to institute suit against the Health Maintenance Organization (HMO) that refused to cover injuries she sustained when the HMO President pushed her down the stairs for complaining about the high insurance premiums. The State Bar gets wind of this and sends you a letter demanding that you immediately cease helping your crippled sister because you are engaging in UPL. You write them a letter back and send it certified mail. Your brief letter states simply:

"I intend to continue helping my crippled sister who I love. Therefore, in reference to your recent correspondence instructing me to cease, and asserting that my kind and loving free assistance constitutes the unauthorized practice of law, please get out of my face you heartless ratbastards."

Respectfully yours,

Your letter is received by the Bar on the 15th, and on the 16th the State Bar's UPL Police arrive at your house and serve you with court documents to appear before a Judge. The question now, is who do you hire to represent you in Court ? Well you toss around the idea of hiring one of your close friends, who is not an Attorney and calls herself a "Legal Technician." She regularly prepares court documents, but you've heard that she is currently involved defending herself against the State Bar in some type of UPL action, so you decide that's probably not a good idea. You tell Sis who's in the wheelchair that she won't be able to have physical therapy next week because you need to take the family's last $ 3000.00 to hire a licensed Attorney to defend yourself. Now, good luck in finding an Attorney who will zealously represent you. You can't have anyone other than a licensed Attorney represent you because of the UPL prohibitions. On the other hand, all licensed Attorneys in your state, are subject to the disciplinary process of the same State Bar that is charging you with UPL. If they do a good job, the whole UPL scheme is at risk. The State Bar is not going to like that obviously, and they have the perfect regulatory mechanism in place to get even with the Attorney. Discipline him by trumping up grounds to suspend his law license or perhaps even disbarring him. If he wants to be able to continue taking his third wife with the voluptuous breasts to Aruba each year, he's not going to want to tick off the State Bar that essentially provides his bread and butter. He'll either convince you to enter into a plea agreement, or will simply go through a half-hearted defense that results in your conviction. Otherwise, he'll probably have to plan on sharply reducing his Pina Colada intake.

Having now delineated the major problems, I propose the best solution, which concededly does not eliminate the disturbing issues entirely, but definitely minimizes them. The key is as follows. Do everything possible to ensure that the maximum number of individuals who fall into categories (3) and (4) are properly licensed attorneys, subject to the ethical rules of conduct. To this extent, it is my assertion that there is an **INVERSE RELATIONSHIP BETWEEN UPL PROHIBITIONS AND STATE BAR ADMISSION STANDARDS**.

The fact of the matter is that the legal profession cannot survive and society would overall be greatly harmed if there were absolutely no prohibitions against the Unauthorized Practice of Law. Such prohibitions although extremely problematic and often unfair as the foregoing illustrates, can potentially serve a vital and useful public purpose. The key to justifying UPL prohibitions and winning the general public's support for them is to ensure that the profession does not keep its' doors unconstitutionally closed by basing admission to the Bar on subjective assessment. **Essentially, the concept is that if the Authorized Practice of Law is regulated in a fair, open and objective manner, then the probability that UPL prohibitions are serving the public's interest, rather than the State Bar's anticompetitive interest is dramatically increased**. The current admission standards which foster subjective assessment based on an individual's attitude, demeanor, and beliefs etc., therefore pose a dire threat to the validity of UPL prohibitions. If the portals of the Bar Associations continue to remain closed to those whose ideas and attitudes the State Bar does not like, it is in fact my assertion that all UPL prohibitions will ultimately collapse in their entirety. The legal reasons are as follows.

The constitutional justification for UPL prohibitions adopted by Courts has chiefly relied on the speech-conduct dichotomy. The basic premise is that speech is subject to greater protection under the First Amendment than conduct which is subject to a greater degree of regulation by the State. The seminal case is *U.S. v. O'Brien*, 391 U.S. 367 (1968). The crux of the Court's opinion stated:

> "When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The threshold issue therefore, is whether a particular behavior constitutes speech or conduct. If it includes both speech and nonspeech elements, the respective elements must be weighed to determine which of the two comprises a greater proportion of the action. It also entails assessing the importance of the governmental interest involved to determine whether the action may be regulated. Courts have held rather uniformly for the last sixty years that the practice of law is "conduct" which may be regulated by the State and not protectable speech. The difficulty in rationally justifying such a stance is revealed by the simple fact that virtually everything a person does encompasses both speech and nonspeech components. Even when a person engages in pure political speech or religious prayer which is uniformly regarded as the zenith of activity protected by the First Amendment, they unavoidably make facial expressions, hand movements or shifts in body posture. Arguably therefore, pure political speech or religious prayer could be manipulatively classified as conduct under the same theory used to justify UPL prohibitions. The bottom line is that the mere speaking of words containing legal information or the writing down of information on legal documents contains vastly greater elements of speech, in comparison to its' nonspeech elements. This makes the legal validity of UPL prohibitions extremely vulnerable.

The problem is further exacerbated by the fact that although Courts have classified the mere speaking of words containing legal information as conduct, rather than speech, (which is the one subject area that enhances the economic interests of attorneys), they have adopted a diametrically opposed stance in virtually every other subject area. In all other subject areas, Courts typically hold that behavior containing a greater proportion of nonspeech elements is protectable speech. Some examples are as follows. In *Cohen v. California*, 403 U.S. 15 (1971) the Court held that wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse was protected speech. In *Gooding v. Wilson*, 405 U.S. 518 (1972) the Court invalidated a Georgia statute that criminalized "abusive language tending to cause a breach of the peace." In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) the Court invalidated a city ordinance that prohibited picketing, except for peaceful picketing of a school involved in a labor dispute. It is logically inarguable that wearing a jacket while physically walking in a Courthouse, using language that tends to cause a breach of the peace, or physically carrying a picket sign are behaviors that contain a higher proportion of nonspeech elements when compared to the mere speaking of words containing legal information. Yet, in this one isolated area which fosters the economic interests of attorneys, Courts hold that such is conduct, rather than speech.

Equally disturbing and hypocritical is the fact that although UPL prohibitions are justified on the legal basis that the provision of legal services is conduct, rather than speech, the prohibitions are applied most aggressively to those activities containing the highest proportion of speech elements. For example, most Courts dealing with UPL litigations have determined that personal counseling poses a greater risk of public injury than the processing of legal forms. Yet, personal counseling consists of substantially greater elements of speech, compared to the processing of legal forms. Personal counseling is almost entirely pure speech. Conversely, the processing of legal forms has greater elements of conduct, and yet hypocritically is often allowed when counseling is not.

It is clear that when Judges apply UPL principles on behalf of the State Bars (the Judges are State Bar members) they play a bit of what is known as a "shell game." It works as follows. UPL prohibitions are justified on the basis that the provision of legal services is conduct rather than speech. But then, those prohibitions are applied most aggressively to situations where the speech element rather than the conduct element is of greater magnitude. The constitutional vulnerability of UPL prohibitions

was demonstrated in the Dissenting opinion of the Great Justice William O'Douglas in *Hackin v. Arizona*, 389 U.S. 143 (1967) where he criticized the Court's failure to squarely address the issue stating:

> "Whether a State, **under guise of protecting its citizens** from legal quacks and charlatans, **can make criminals of those who, in good faith and for no personal profit, assist the indigent** to assert their constitutional rights is a substantial question this Court should answer."

UPL prohibitions came very close to collapsing in their entirety in *NAACP v. Button*, 371 U.S. 415 (1963) where the Supreme Court held that within the context of the petitioner's case, litigation was a form of political expression and means for achieving equality of treatment. The Court rejected the State of Virginia's false assertion that the purpose of the UPL prohibitions was to insure high professional standards and further determined that a State may not, under the "guise" of prohibiting professional misconduct ignore constitutional rights. That case dealt with an attempt by the Virginia State Bar to unlawfully use UPL prohibitions to frustrate the U.S. Supreme Court's opinion in *Brown v. Board of Education*. Quite a far leap from the Virginia Bar's professed purpose of protecting the general public's interest, and raising substantial doubt as to the sincerity and credibility of State Bar representations.

It is also noteworthy that the U.S. Supreme Court determined in *Johnson v. Avery*, 393 U.S. 483 (1969) that a State may not validly enforce a regulation which absolutely bars inmates from furnishing legal assistance to other prisoners. The result of this is that imprisoned criminals are legally allowed to provide free legal assistance to other convicted criminals free from concern of UPL prohibitions, but law-abiding citizens may not help other law-abiding citizens. Once again, the hypocrisy makes the Judiciary look ridiculous. As stated previously, and notwithstanding my criticism of UPL enforcement currently, I do believe that reasonable UPL prohibitions can promote the general public's interest by protecting them from the delivery of legal services by incompetent and dishonest individuals. There is little doubt that in the absence of such prohibitions, many people will provide legal services without a sufficient knowledge of the law. Ultimately, their victims would be the helpless litigants. The solution to this dilemma rests upon focusing exclusively on the general public's interest. The economic interests of attorneys and State Bar should be totally ignored. Stated simply, if the State Bars ensure that their doors are wide open to qualified individuals who are then regulated, rather than making admission determinations based on who the admissions committee subjectively likes or dislikes, or who they believe will support State Bar financial interests, which is in substance precisely what is transpiring currently, then UPL prohibitions are justifiable. Otherwise, the UPL prohibitions are just being used to create a transparent anticompetitive monopoly that makes the Judiciary look hypocritically foolish.

There is an **Inverse Relationship Between UPL Prohibitions and State Bar Admission Standards.** The general public's interest is best furthered by liberal State Bar admission standards, which in turn mandates strict enforcement of reasonable UPL prohibitions which I would fervently support. Conversely, it is my position that continuance of a subjective and discriminatory admissions process that is predicated on factors including an Applicant's attitude would mandate complete elimination of UPL prohibitions in the public's interest. Stated simply, the legal profession will open its doors in a fair and objective manner like every other profession, or alternatively the legal profession's entire monopoly will be eliminated.

13

IN DEFENSE OF JUDGES

Throughout this book, it will become quite apparent (particularly in the Sections where I analyze State Supreme Court decisions regarding the Bar admissions process) that I'm rather critical of the irrational thought processes and opinions of Judges. In all fairness, I therefore felt that before intellectually tearing apart their opinions, and logically demolishing their hyper-sensitive, fragile egos, I should provide a few words in their defense and in their favor. I now do so.

It's a crappy deal to be a Judge. Considering the amount of training, intellect and hard work required, the pay is really lousy. Any good Judge could earn more money in the business world. A Judge is almost certain to have a large number of people disliking them, since any case that does not settle, results in one party being the loser. The loser will hold the Judge responsible. In a case involving a societal issue of significant consequence, a Judge could easily make thousands of political adversaries at one time, just by rendering a decision that they honestly believed was correct.

Judges have an immense degree of power in one respect, and yet in another respect are much more helpless than the average member of society since their job entails a lonely existence. They can't openly discuss what they do at work on any given day. They have to watch every single little thing they say or run the risk of being accused of bias or prejudice. Their supporters will never be as vocal as their adversaries. Since it is impossible for a person to be correct all the time, they have to be prepared to endure feelings of internal guilt in those instances when they try to make the right decision, but make the wrong one, resulting in pain and anguish to another person or group. They are destined for sleepless nights, second-guessing, internal guilt, the impossibility of doing the right thing in certain cases, mistrusting those around them, a lack of appreciation from the public even when they act courageously, an inability to enjoy life to its fullest, and ultimately total loneliness. At best, they'll receive some verbal adulations and expressions of appreciation on the day they retire after decades of public service. At worst, they'll retire with the internal feeling and belief that no one ever liked them or appreciated them.

For those that do choose to serve on the bench, they are not selecting merely a career, but rather instead an entire lifestyle. The bench follows a Judge every single hour and minute of their life. They're thinking about it when they're sitting at home with family members as the issues pertaining to some case are lurking in the back of their mind. They think about the bench when they wake up, go to sleep, and while they're sleeping. The bench quite simply put, never leaves the Judge. There are seven days in a week and 24 hours in a day, which equals 168 hours per week. That's what a person signs up for when they become a Judge. A 168 hour work week, which calculates to an absolutely horrible hourly rate.

It is undoubtedly a crappy deal. But that's life. No one is forced to become a Judge. And once they do, the general public demands a lot. Society is wholly unconcerned about what the Judge can do for other attorneys and the State Bar. Society wants and demands one thing only from the Judge. It wants the Judge to render rulings in the best interest of the litigants and general public, in accordance with the rule of law. The impact of any ruling or decision on the attorneys involved, is of negligible concern or importance to the public. If the Judge is faithful to the public they are simply viewed as having done their job, and there is no need for expressions of appreciation. Conversely, if the Judge fails to do so, society views the Judge as contemptible.

There are two alternative reasons an individual decides to be a Judge. First, a person may become a Judge because they want the power. Such individuals are what is known in technical legal terms as "morons." Their motivations will ultimately become uncovered by their peers, and the result of their career will be pure personal misery. The second and hopefully more common reason, is not quite as straightforward or easy to explain. It consists of the Judiciary, the bench, the rule of law, respect for reason and rationality coupled with an equal respect for passion, a sense of injustice, and a desire for justice, being embodied within the individual's blood, heart, and soul. These are the individuals that have a burning desire to improve society and help the litigants with whom they identify. They become the Great Judges. They deserve the unwavering support of the general public. They deserve to have society place total faith and confidence in them, and they deserve to have the general public protect their respect when such is under an unwarranted political attack that is devoid of reason or logic. They deserve appreciation and respect from the litigants and the general public. But sadly, wrongly and unfortunately, they probably won't get it because that's not how society works.

It's a crappy deal to be a Judge.

14

HUMPTY-DUMPTY AND THE SEMANTIC SCALPEL

The Oregon Judiciary Branch of Government including its' State Supreme Court, Court of Appeals and Marion County Circuit Court; and I have definitely had our differences of opinion. We have developed what I consider to be a very healthy intellectual friction with each other that promotes a diminishment of their judicial ability to circumvent the law and U.S. Constitution. It has undoubtedly been a learning process for both of us. For instance, they taught me that if I desire to challenge their power it would be best if I do not enter into the geographic boundaries of their State. I have taught them that the best way to adjudicate cases requires a strict adherence to the rule of law and the strength in judicial moral character to not simply render decisions merely for the sake of "going to get along" with popular local attorneys. The reason is that ultimately a Nonattorney comes along who understands the driving economic forces behind amateurish, transparent judicial deceptions, and outplays them.

More importantly, the Oregon Judiciary has educated me as to how Courts utilize what is known as a "semantic scalpel" to ensure that immoral judicial goals are attained. The semantic scalpel is an implement used by Judges to render judicial rulings by causing words to be defined in a manner extending beyond their common and ordinary usage. The technique has been summed up by its' main proponent Chief Justice Wallace Carson of the Oregon Supreme Court as follows:

> "When I use a word, "Humpty Dumpty said in rather a scornful time, "it means just what I choose it to mean -- neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master -- that's all."
>
> State ex rel Frohnmayer v Oregon State Bar, 307 Or. 304 (1989), Justice Carson, Fn2; [15]

A prime example of use of the semantic scalpel was when former President Bill Clinton on national television stated authoritatively, "I Did Not Have Sex With Monica Lewinsky." Ultimately, it was discovered that he got a "Blowjob" from her. I am not a particularly big fan of Bill Clinton. Nevertheless, he was arguably subjected to an immense degree of unjust criticism for making the foregoing statement. The reason is as follows. He relied on a definition of the term "Sex" that was formally adopted by the Court in his litigation.. That definition did not in fact, include "Blowjobs." The problem was that pretty much every American considers a "Blowjob" to be included in the term "Sex." The common and ordinary usage of the term adopted by virtually everyone includes "Blowjobs."

The general public always relies on the common usage of a term. Judges can't change that. That is why the general public condemned Clinton. As indicated previously, I don't like Bill Clinton. I thought he was a lousy President, and really nothing more than an exceptionally good actor. Nevertheless, I do believe the public's condemnation of Clinton's attempt to rely on a carefully worded definition of the term "Sex," that was in fact formally adopted by a Court of law was unjust. To put the matter simply, Clinton only did what Justices of State Supreme Courts do every single day.

Clinton was a lawyer. Throughout law school and his entire career, he had been educated to the fact that words can be defined in a limitless manner to suit one's immediate needs. Like all of the Judges and attorneys he had worked with during his career, he played a game of semantics with the term.

Games with semantics are the very heart and soul of the legal profession. However, when such games are exposed to the general public, people who play them appear as deceptive liars. The Judiciary of this nation is now faced with a major problem. Similar to how Clinton's attempted use of a semantic scalpel got him into trouble, Judges and State Bars are finding that their use of the tool is becoming less successful. Appellate opinions are now easily obtainable by members of the general public. That is a fairly recent phenomena. One can obtain appellate opinions at a very low cost on the Internet. As a result, the manner in which Judges and Appellate Courts play deceptive, clever little games with word meanings and definitions in accordance with Bill Clinton and Chief Justice Wallace Carson's "Humpty-Dumpty" technique can now easily be exposed to the general public.

In many respects, it is like the tricks used by a magician. Once a person discovers how the magician accomplishes his tricks, they are never fooled by such deceptions again. That is precisely what is occurring in this nation currently. The public is rapidly becoming educated to how Courts, State Bars and lawyers manipulate word meanings and the rules of procedure to frustrate fair and impartial adjudications. As a result, more litigants are opposing the Courts, rather than trusting them. Judges and State Bars are becoming less successful at accomplishing their self-interested goals, because the tricks they have relied on in the past are no longer working.

Litigants are starting to view Judges as one of their "opponents," rather than impartial decision-makers. As such, Judges are no longer considered to be honest people in whose hands you may trust your children, property or freedom. They are viewed as people you have to outmaneuver, outplay and outstrategize. Like everyone else in society, Judges are now simply viewed as people looking to do what's best for themselves. You have to play their game, better than they play it. Similarly, representations made by Courts to litigants during the pendency of a case are no longer viewed as necessary steps intended to resolve matters fairly. Rather, litigants are assessing judicial representations in light of the procedural "Trick," the Court is probably trying to play to frustrate fair resolution of the issue. Litigants are beginning to understand that they often have four opponents in a litigation. The opposing party, the opposing party's attorney, their own attorney, and the Judge.

The most immoral application of the semantic scalpel occurs when Judges use it in a manner to allow a term's definition to not simply be modified, but instead to have the exact opposite meaning of its' common and ordinary usage. For instance, in Crocker v Crocker, in April, 2001 the Oregon Supreme Court determined that the term "child" includes "adults" within its' definition. The Oregon Court of Appeals had earlier used manipulative subterfuge to hold similarly. It seems to me that the common and ordinary usage of the term "child" is intended to specifically differentiate the individual from an "adult." Otherwise, there would be no need for either term. The Oregon Supreme Court in the same opinion concluded that the children of "any married person" only meant children of "married persons who are not cohabiting." Children of married persons who were living together, were therefore excluded. The court accomplished this deceptive subterfuge by using a semantic scalpel to arrive at the conclusion that the term "any" only meant "some." It was absolutely incredible. Within one single opinion, the Oregon Supreme Court had substantively concluded that the term "child" includes "adults," but excludes children. [16] The meaning of the term had been diametrically reversed. The Court's ultimate decision on the legal issue involved was obviously irrational since it was supported by irrational reasoning. Notably and commendably, the Great Justice Paul De Muniz of the Oregon Supreme Court did not sign on to such Nonsensical Judicial Trash, wisely choosing instead to not participate in the Court's ridiculous opinion. Ironically, only one month previously, the same Court wrote as follows in a different case:

""Any" is defined, . . . (in context, "any" synonymous with "every") [17]
Outdoor Media Dimensions v Oregon, SC S44590

It would seem to be the simplest term in the world. The word "Any." Yet, the Oregon Supreme Court in two different cases, less than two months apart, adopted two completely different definitions of this one simple word. In one case, "any" meant "some" and in another, "any" meant "every." Tomorrow, to meet their immediate goal, "any" will mean "none." It is nothing more than an amateurish game of judicial deception. Once exposed it diminishes the legitimacy of those who write such judicial opinions. Bill Clinton also was criticized for his response to another question. His response consisted of inquiring about counsel's use of the term "is" (What "is" is?) Undoubtedly, he was again playing a game with a semantic scalpel. Yet, in a recent Oregon case, the Court wrote as follows:

"Our construction of the rule is not impaired by the use of the word "or" as a connector between the terms. . . ."Or" does have a disjunctive meaning. . . . However, often "or" is used by the legislature to connect alternatives that are not mutually exclusive but, rather, may each cause a certain result or apply in a given circumstance. . . . Thus, the use of "or" as a connector between the two types of recovery simply acknowledges that an award of one does not require the award of the other. It does not suggest that, when both are awarded, they may be awarded in separate judgments. In fact, the reverse is true." [18]

I see absolutely no reason why we should politically criticize any President of the United States for questioning the meaning of the term "is," if Courts, Judges and attorneys have to engage in extensive litigation over the meaning of the term "or." Judicial support for utilization of the semantic scalpel is found in the historic statement of Justice Oliver Wendell Holmes who wrote:

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and time in which it is used."
Towne v Eisner, 245 U.S. 418, 425 (1918)

Undoubtedly, there is merit to his statement. Depending on the context, words do mean different things at different times. By the same token however, Holmes' statement was not intended to create a carte blanche environment for Judges to drastically alter word meanings to accomplish judicial goals. Justice Harlan, Great Dissenter on the Warren Court of the 1960s wrote the following historic passage:

"Almost any word or phrase may be rendered vague and ambiguous by dissection with a **semantic scalpel**. . . . <But such an approach> amounts to little more than verbal calisthenics."
Cole v Richardson, 397 U.S. 238, 240 (1970)

As will be demonstrated later herein, Harlan was the strongest supporter on the U.S. Supreme Court for retention of the State Bar admission "good moral character" requirement. He wrote the foregoing statement at a time when the admission process was under heavy legal attack, specifically on the ground that the phrase "good moral character" was vague and ambiguous. His foregoing statement is a proper condemnation of judicial use of the semantic scalpel. It is also an admission on his part, that use of the semantic scalpel does render words and phrases vague and ambiguous. The State Bars and State Supreme Courts by utilizing the instrument known as the "semantic scalpel," have done precisely and exactly what Harlan warned them not to do. They have rendered the "good moral character" requirement totally vague and ambiguous. There is no doubt State Supreme Courts should stop using Humpty Dumpty Semantic Scalpel techniques in their opinions. Cause let's face it. Humpty Dumpty was a fairly clumsy guy who fell off a wall. And clumsy people shouldn't play with scalpels. Naturally, if you're ever accused of breaking the law in Oregon, just inform the Judge that the term "unlawful," actually means "totally legal." All you need is a semantic scalpel.

15

The following sections criticize numerous articles that appeared in the National Conference of Bar Examiners' (NCBE) magazine called the "The Bar Examiner," which started publication in 1931.

THE BAR EXAMINER

IDEALS and PROBLEMS for a NATIONAL CONFERENCE OF BAR EXAMINERS
By Philip Wickser, Secretary of the New York Board of Law Examiners and Chairman of the First Meeting of the NCBE - Bar Examiner, November, 1931,(4-17)

The first article in the first issue proves the point as good as any. It was designed to outline the "Present Aims and Objectives of Conference of Bar Examiners." Pennsylvania's system later abandoned by that State, was at this time characterized as "advanced as any other state." The Pennsylvania Character Committees were commended because they "put a great deal of time and attention on finding out about the young men who come before them." This article's discussion of "ethics" borders on the incredible. Essentially, it asserts that ethics consists of that which destroys individuality, in favor of a group thought mentality that allows the legal profession to thrive economically. The following is an excerpt :

> "One of such important considerations touches the problem of ethics. Slowly, through the centuries, its leaders have taught the profession that membership in it implied a certain discipline of thought and action. . . . The young lawyer's mind was stored with certain word-pictures which indicated how the typical lawyer--in psychological terms--how the group, or the clan to which he belongs, acted in a given situation. The voice of the clan, the force of its dictates, is strong in every situation in life. **When an individual lawyer struggled with an ethical question touching his own actions, the picture of how the group demanded that that question should be answered had to be dealt with. . . . The struggle itself was a protection to the group. It retarded the formation of anti-group habits, which, in themselves are, functionally, nothing more than a rebellion against group teachings and ideals. But in order to insure that the struggle would take place the group idea had to be kept alive and active in the mind of each lawyer. It was kept alive by his being made to feel that he "belonged." Only through membership in it could he become part owner in the economically valuable franchise which, actually and historically, the group alone secured from the public. It alone had made the public believe** that the functioning ideals and disciplines which it had developed and proclaimed were, as a social matter, worth the price, and that the special sources of revenue which society consented that the Bar should have, were well earned. **Thus, when group consciousness is strong the ordinary lawyer can not easily separate ideal values from economic values."**

Keep in mind this is not just any article in one of the magazine's issues. It is the opening article of the first issue designed to delineate "Aims and Objectives" of the organization. An organization that still thrives today and is the cornerstone of the admissions process. The key predicates are "group thought" and an economic franchise secured from the public by making the public believe the functioning ideals were worth the price. This "group thought" concept is precisely the reason litigants can't get effective representation from attorneys they hire. The attorney's first obligation is to his "group," even at the expense of the client. The article closes with the following:

> "To be sure, such an idea implies a degree of professional integration beyond anything we now have, an idea indeed, itself not everywhere welcome. Integration, however, is not quite so far away as some may think. **We are rapidly being compelled to integrate by outside forces, most of which are ultimately economic, and, correspondingly powerful. We live in an age in which groups compete and individuals fall into line.** The unit of thought is now some multiple of the individual; the unit of action, some consolidation of individual energies."

The means envisioned to foster the economic interests of attorneys were rooted in Supply-Demand economics based on the NCBE's assertion that the number of lawyers had to be reduced. The concept was that if the number of lawyers is reduced, then those who succeed in becoming attorneys will enjoy a large market (Demand) and a small population of attorneys to fill that market (Supply). The result of high Demand and low Supply obviously being inordinately high legal fees.

Politically, the Bar could not assert the legal profession should be difficult to enter so that lawyers may charge high fees. Such an argument would fail miserably. What they needed to do was conceal their true intent with a politically appealing statement, that would ostensibly justify reducing the number of lawyers. What they came up with, was to justify denial of Bar admission on the disingenuous ground that the general public needed protection from individuals providing incompetent legal services. In this manner, the profession would give the appearance of looking out for the public interest and simultaneously reap the economic rewards. Their scheme is conceded by this author to be brilliant, albeit entirely diabolical. In furtherance of such goals, Wickser states :

> "We know, for instance, that the Bar, today, is overcrowded, and is becoming more so. Each year there is more jostling and less room. . . .
> . . .
> To generalize, any system of examination which passes less than 60% of those first applying, but which eventually passes more than 80% of the whole number, indicates first, that it has not been properly related to the educational system whose product it judges, second, that it is serving the public but indifferently well by saddling upon it much of the very material from which was designed to afford protection. . . .
> . . .
> The problem of volume appears to be here to stay, for some years at least."

The NCBE was formed to curb the ability of a lawyer to function as an individual and to foster a community of attorneys who would function as a group, even at the expense of quality representation. That is why citizens today feel their attorney is not fighting for them, but instead providing improper "courtesies" to opposing counsel. That is why people have the feeling lawyers are part of a "Club," or "Good ol' boy" network. They are. It becomes a situation where the litigant properly perceives they are being opposed by the other party, opposing counsel, and then most inappropriately, their own attorney. Wickser addresses what he perceives as the "problem" of attorneys not functioning in accordance with group thought and stressing the need for such, when he states :

> "The difficulty in this country is that the last generation has allowed the basic group concept of the Bar to become so attenuated that admission to it imports little more, in the emotional field, than a vague sense of contact with a far-off abstraction called the state."[19]

THE FUNCTION of BAR EXAMINERS,

By Stanley T. Wallbank, Member of Executive Committee of NCBE
Bar Examiner, December 1931, (27-42)

The unbridled power of the State Bar Examiner was characterized by the NCBE in the December, 1931 issue of the Bar Examiner as follows, which in itself may be considered an organizational goals statement. Wallbank writes :

> "In performing his duties, the bar examiner wields vast powers in that he may determine the improvement or degradation in the caliber of the bar, and **he wield powers even more far-reaching, for he may to some extent determine the destiny of the nation. . . . It is plain, therefore, that as the character of the bar is maintained, to that extent are the affairs of government likely to be maintained."**

Wallbank was concerned with trimming the number of attorneys available to serve the public. He begins by asking the question :

> "What are the proper legal training and satisfactory moral qualifications?"

His next paragraph lays the groundwork for drawing a nexus between utilizing "proper legal training and satisfactory moral qualifications" to trim the supply of lawyers. He asserts the Bar is overcrowded stating :

> "To obtain a perspective of our task, let us draw back a moment to visualize a numerical picture of the National Bar. It will readily be conceded that our problem is national in character and scope, although the incidence of the remedies to be applied is probably local. The 1930 U.S. census figures are not yet fully available, but in the light of the best estimates obtainable, the National Bar probably numbered about 160,000 in 1930. This compares with about 122,000 lawyers in 1920, and with 114,000 lawyers in 1910, making an increase since 1910 of over 40%."

He then supplies statistics to demonstrate the number of attorneys has increased substantially. His goals are twofold. He wants to strategically utilize the admissions process to reduce the number of attorneys (Supply) which results in increasing profits for the remaining attorneys. In addition, he wants to utilize the process to help determine the "destiny of the nation." Successful accomplishment of his goals would ensure a small number of attorneys controlling the nation and profiting from it. The Bar admissions process would serve the purpose of gleaning out attorneys who will not succumb to the "group thought." The asserted need to glean out such attorneys was predicated on the obvious fact that they represent an economic threat to the profession. The sales pitch to win the general public's support is to "protect" them from unscrupulous attorneys. Wallbank then cleverly stresses the importance of proper standards for admission to the legal profession to further the public interest. He correctly recognizes the critical importance of the admissions process in allowing the legal profession to gain an advantage over others when he states:

> **"Examiners are in a most advantageous position** to determine in what respects candidates are lacking or deficient, what characteristics they exhibit, and what broad tendencies are discernible in their legal training and preparation. It is the examiner's plain duty to **make known this first hand information to the profession . . . .**
>
> If New York . . . eventually excludes only about 5% of her applicants, as was recently reported, we have the duty of making known that fact.
>
> If too many illiterate candidates are taking examinations for the bar in Arkansas, for example, where no requirements of general education obtain, it is our duty as examiners to report that fact to the profession. . . . There are no others in the peculiar position of bar examiners who can so directly, fairly and intelligently determine all these facts, and therefore we should regard it as our duty to correlate properly information bearing upon our work and supply the profession with the facts. . . .A professional consciousness must be developed. **Wise publicity will help**."

Wallbank then takes the Bar's domination scheme further. His goal was for the admissions process to work in conjunction with the legal education process. The concept was not new, but was definitely gaining steam at this time. The basic theory rests on the premise that if you control the law schools, you ultimately control the students who will be applying for admission. He states :

> "In considering the relation between the law schools and bar examiners, it is evident that these are closely related agencies, if not as closely related as the bar and the examiners. An ideal plan would be to have all law schools so regulated and operated, subject to the supervision of the American Bar, that graduation and suitable clerkship would automatically admit the applicant, but present conditions make that theory too Utopian for present practical considerations."

Wallbank approves wholeheartedly of the discriminatory Pennsylvania plan that became the model for the NCBE at this time, stating:

> "There would appear to be no duty higher than that of perpetuating the American Bar by first selecting suitable persons for law training, sponsoring them under the Pennsylvania plan during their law study . . . ."[20]

THE PENNSYLVANIA CHARACTER and FITNESS REVIEW

When I applied to the Pennsylvania Bar in 1995, I had absolutely no idea that I was applying to the State Bar which was probably the most significant contributor to the NCBE's political rise. The application I was required to file asked fewer character review questions than virtually any other Bar in the nation. This I know because I requested applications from every single State Bar. The leniency of the Pennsylvania character application was the specific reason I selected Pennsylvania. I had to provide basic name and address information. They asked for my principal addresses during the last ten years. They asked whether I was addicted to narcotics, liquors or other substances. They asked whether I was ever confronted by an employer regarding truthfulness, inability to work with others, the manner in which I handled money, competence, or my moral standards. That question annoyed me because it was so vague, overbroad and ambiguous. It essentially went right to back to the notion from the 1930s of determining whether an individual is "unworthy." It was one of the few inquiries on the application that was wholly subjective in nature and interpretation.

They asked whether I was ever expelled or suspended from school and whether I ever altered or falsified any official document referring to professional qualifications. They asked whether I was currently the subject of any investigation of any law enforcement agency, and whether I was ever arrested, or prosecuted for any crime. Inquiry was made as to whether I ever filed a petition for bankruptcy and information pertaining to debts that were in arrears. They also asked whether I ever applied for a permit or license which required proof of good character, was ever charged with commingling or misusing funds, and they required a list of my employers for the prior seven years. The questions included inquiries pertaining to whether charges of professional misconduct were ever filed against me, whether I had ever resigned as a member of a Bar, or been disbarred.

The foregoing probably sounds extremely comprehensive to most readers. The fact is however, Pennsylvania had the most lenient inquiry of any Bar. They didn't require me to provide numerous written references or specify that such references had to be from attorneys. They didn't inquire into whether I had ever received traffic tickets, or request information about civil litigation, and they limited inquiry regarding prior employers to the last seven years instead of since I was 21 which is the standard other Bars use. Shortly after being admitted, I applied to the District of Columbia Bar. The DC Bar required me to complete an NCBE character questionnaire which was much more comprehensive in scope than the Pennsylvania application. The process of completing the DC application made me resent the application process. I felt they were too nosy, asking many highly personal, improper and unconstitutional questions. The fact that I now confirm I resent having had to fill out the NCBE questionnaire, notwithstanding that my application was approved, I believe supports the sincerity of my viewpoints. The NCBE application I filed in 1996 that resulted in my admission to the DC Bar, in addition to a wide host of cumbersome immaterial information, required me to provide written references from fourteen individuals. Three references had to be provided from each locality that I had lived in during the last 15 years, three references had to be from licensed attorneys, and two references had to be from a client, law professor or attorney.

I had to provide addresses for residences during the last ten years and information pertaining to debts, civil litigation and comprehensive questionnaires on employment. If I had been 51 years of age when filing the DC application I would have had to provide employment information for the last 30 years, if I had been 61 I would have needed the information for the last 40 years. If I had lived in 10 different localities, then I would have had to provide 30 references, since three were required for each. The term "locality" was not even defined. Did they mean a city, state, or region of the country? Pennsylvania did not in 1995 use the NCBE character questionnaire. The application I filed with Pennsylvania also did not faintly resemble the one they used in the early 1930s The Pennsylvania application from the 1930s is however characteristic of that used by other Bars today.

The Pennsylvania Plan in the 1930s encompassed four questionnaires. One was the Applicant's questionnaire to register as a law student, one was a Citizen's Questionnaire to be completed by three "reputable citizens," one was a sponsor's questionnaire to be completed by the Bar member sponsoring the Applicant, and one was a questionnaire to be completed by the examining board that interviewed the Applicant. I have decided to present some of the questions used by Pennsylvania in the 1930s, which I obtained from an early Bar Examiner issue. You will no doubt find them to be incredible. These questions were applauded as the model for all states to follow in the early years of the NCBE's inception. I believe they conclusively demonstrate what the NCBE is all about and confirm the animosity of the legal profession against immigrants and minorities.

QUESTIONS FROM PENNSYLVANIA QUESTIONNAIRE FOR REGISTRATION OF LAW STUDENTS (Numbered to correspond with the 1932 questionnaire)

2. State **names and residences of parents, and their occupations** during the past five years. **Are your parents native or foreign born?**

8. **With what charitable or fraternal organizations, church or religious body**, if any, are you **and your parents** affiliated?
State location of church, and name and address of present pastor, priest, rabbi, or overseers, or local head of religious, charitable or fraternal organization.

10. Do you wish to adopt the legal profession for a life work?

15. State when and where you expect to acquire your legal education?

16. State in a general way the plans for your future in the legal profession.[21]

QUESTIONS FROM PENNSYLVANIA CITIZEN'S QUESTIONNAIRE TO BE ANSWERED BY THREE REPUTABLE CITIZENS (Numbered to correspond with the 1932 questionnaire)

3. How long have you known the applicant?

4. State fully **how intimately** you know him.

5. How frequently, how intimately and under what circumstances have you come in contact with him since you have known him?

7. What are the **reputations of his intimate associates?**

9. Do you believe he has a deep-seated sense of the difference between right and wrong?

11. How long and **how intimately have you known the members of the applicant's immediate family ?** Give names and relationship.

12. What is the **general reputation and standing of his family** in the community?[22]

QUESTIONS FROM PENNSYLVANIA SPONSOR'S OR PRECEPTOR'S QUESTIONNAIRE (Numbered to correspond with the 1932 questionnaire)

8. How frequently and how intimately have you come in contact with him during the past six months?

9. If you have not known him personally for six months past, what inquiry have you made of responsible persons who have known him for that period or longer?

11. What reasons has the applicant given you for having selected the profession of law as a vocation?

13. Do you believe that the applicant has a deep-seated sense of the difference between right and wrong?

15. **Do you know the applicant's family;** if so, how long have you known them, what members of the family do you know--naming them, as father, mother, brother, sister, etc. --and **how long and intimately** have you known each?

16. **Are the applicant's parents native or foreign born?**

17. What is the **reputation of the parents** in the community in which they reside?

18. How long have they resided in the locality where they now reside ? If less than five years, state previous residence.

19. **What is the father's occupation?** If changed in the past five years, so state, and state former occupation or occupations?

20. **How many children are there in the family?**

21. **State the general character of education provided for each of the children by their parents,** and especially for the applicant.

22. If possible, interview one of the applicant's last educational instructors and state in detail what he said concerning the applicant's industry, integrity, and sense of right and wrong.

24. What is applicant's reputation in the community in which he lives, or in that from which he has lately removed?

27. **What is the reputation of his intimate associates?** [23]

QUESTIONS FROM PENNSYLVANIA LOCAL EXAMINING BOARD'S QUESTIONNAIRE (Numbered to correspond with the 1932 questionnaire)

This questionnaire included questions similar to those listed on the previous pages. In addition, it contained the following two questions which I thought were most interesting. The questions are directed towards the attorney members of the Local Examining Board who review the application for admission.

8. Do you know personally any of the persons who have vouched for the good character and integrity of the applicant?

9. From what you know of them personally, or from the information you have been able to ascertain from others, do you believe the persons who have vouched for the character and integrity of the applicant are people of good standing in their respective communities? [24]

CHARACTER EXAMINATION OF CANDIDATES,

Extracts from a Round Table Discussion Held in Connection with the Meeting of the National Conference of Bar Examiners at Atlantic City, September 16, 1931. Bar Examiner, January, 1932 (P.63-82)

The NCBE conducted a round table discussion on character review which was written up in the January, 1932 issue of The Bar Examiner. Mr. Morris Duane, Bar Examiner for the Pennsylvania Board of Law Examiners expressed the Bar's position as follows regarding the character review :

> **"First, there is the very easy case, the case of the man whose father or uncle has been known to the Board, etc. He, of course is immediately passed.** . . . The most difficult question that the County Board has come up against is as to **whether they should reject a man because of his appearance, his manner, or general surroundings.** They do not think he should practice law **but they have nothing against him. . . .**
>
> The enthusiasm which the general plan of preceptors has aroused in Philadelphia I think is shown by the fact that there was a dinner there of over 400 Jewish lawyers. Two points were stressed : ***first,* that the older Jewish members of the bar should constitute themselves as a group** to aid and advise worthy young men, and ***second,* that in the interest of the Jewish members of the bar**, the profession as a whole and the public, the ambition of unworthy young men to enter the profession should be discouraged. . . . If a lawyer knows that that young man is not worthy it is a great opportunity to tell him so in some tactful way".

Later Duane states :

> "Sometimes we ask a man if his parents live here. He says, "Yes." "What does your father do?" "He is a contractor." "Business successful?" "Yes." "Any other children?" "No." "You and your father on good terms?" "Yes." "Father want you to go into business with him?" "Yes." "Why don't you do it?" "I just thought I would like to study law." The man has no education and not much capacity to get one. . . . **There is a man who is practically colorless but we cannot pin any particular thing on him. We cannot prove that he committed any crime but at the same time we think it is silly for the man to waste his time studying law."**

Paul Shipman Andrews, Dean of the University of Syracuse Law School stated :

> "Gentlemen, the subject of this round table deals with ways and means of raising the standards of the bar. That there is a necessity of raising those standards is probably apparent, **particularly to those of us who are familiar with conditions in the larger cities."**

His reference to "conditions in the larger cities" exemplified the Bar's prejudicial mindset. They wanted to curb the ability of foreign born immigrants to gain admission to the Bar. The Pennsylvania Plan praised by other Bars at this time was predicated on controlling the admissions process by imposing character standards at the law school level. Duane summarized it as follows:

"Now to look at the plan as set forth . . . there are three essential requirements :

(1) An investigation as thorough as is reasonably practical of the moral qualifications of the applicant on two occasions, first when he registers as a law student, second when he applies for final examination. By that means you have a double check on the man. You have him when he first comes up . . . and then you check his character to see if he is still entitled to practice.

(2) The requirement that each student have a preceptor during the entire period of law study. . . .

(3) A six months' clerkship . . . ."

The Pennsylvania Plan ultimately collapsed years later. Even today however, it is irrationally emulated by other State Bars. Law Student Registration promoted initially by Pennsylvania has been bouncing in and out of State Bars for decades. As stated previously, when I was a third year law student in 1994, the University of Oregon Law School indicated that for classes subsequent to my own, registration would be required. Whether they actually implemented the program or not, I do not know. The two key prongs of the Pennsylvania Plan were dual character investigations, and the Preceptorship. Character would be investigated when you entered law school, and also when you applied to the Bar. The Preceptor would keep an eye on you during law school. The Plan facilitated "group thought" goals and allowed the profession to exert control over the individual by leveraging their ability to obtain a law license. It accomplished such a detestable goal, by controlling the prospective attorney from the first day they entered law school. Duane outlines the manner in which the Pennsylvania Plan operates further. He states:

'The first step is the questionnaires. Each applicant to be registered must submit seven questionnaires each containing about twenty questions to be answered by himself, his sponsor, business men, and others. The questionnaires are precisely worded, and contrary to expectation have proved of great value. . . .
. . .
Another question requires the candidate to state whether he has ever been a party to a proceeding civil or criminal, and, if so, to state the facts fully. **On the civil side, it is conceivable that the facts developed in divorce proceedings, for example, might justify a refusal to permit registration. . . .**

Another question states that experience shows that the income of the average practicing lawyer is less than that of the average business man, and asks why, knowing this, does the applicant wish to be admitted to the bar. . . .
. . .
In addition to these questionnaires the county board has an elaborate system of personal interviews. . . .Interesting questions are asked.
. . .
In every instance in which the examining committee believes it necessary to reject the applicant **advice is first given to him to withdraw the application.** This advice is accepted in about fifty percent of the cases." [25]

George H. Smith of Utah, and former Chairman of the ABA Section of Legal Education and Admissions to the Bar makes a prejudicial contribution to the discussion as follows:

> **"Sometimes you have wonderful character evidence displayed even though the applicant is not well-educated or his parents were born in Russia."**

Smith's statement personifies quite well what the ABA Section on Admissions to the Bar is all about.

THE REAL DISTINCTION BETWEEN PART-TIME and FULL-TIME LAW SCHOOLS

By Alred Z. Reed, Of the Carnegie Foundation for the Advancement of Teaching
Bar Examiner, March 1932, (P.123-132)

Eliminate the ability of economically disadvantaged individuals to attend law school and you ensure a profession predicated on the furtherance of NCBE economic goals. A privileged profession. Eliminate the law schools typically attended by economically disadvantaged individuals and you eliminate their ability to attend law school. How do you eliminate those law schools though? The answer is simple. Deny their graduates the ability to obtain a law license. Obviously, the NCBE could not simply assert that law schools which cater to economically disadvantaged individuals should be eliminated for the purpose of excluding their graduates from the legal profession. That would look bad to the public. It would not fall into the category of "wise publicity." The NCBE needed a statement of purpose that sounded appealing to the public, and simultaneously furthered their anticompetitive goals.

Typically, economically disadvantaged individuals attend law school on a part-time basis. This is because they don't have enough money to stop working and go to law school full-time. The ABA, NCBE and the legal profession as a whole, therefore wanted to eliminate the part-time law schools that allowed attendance of law classes at night. Reed's article comments on an opinion of the New York Court of Appeals. In the case, *"Petition of the Association of the Bar of the City of New York to Amend the Rules of the Court of Appeals Relative to the Study of Law,"* 257 N.Y. 211 (1931), the Court denied a Bar Petition to amend the rules. Specifically, the amended rule if adopted would have required more classroom hours for students attending part-time law schools (1024 hours over four years), compared to those attending full-time (960 hours over three years). The Court's decision was for the most part logically sound. They properly recognized the discriminatory nature of the proposed amendment and rejected it. The opinion however, included a disturbing statement that ultimately contributed to adoption of the discriminatory plan years later. The New York Court of Appeals left the door open when it stated:

> "The court feels constrained at this time to deny the applications, **but the interesting data submitted will be the subject of reflection, and with the co-operation of the bar and of the faculties of the law schools may lead to action in the future."**

The foregoing statement was made notwithstanding that the Court expressly stated in its opinion :

> "A definition based upon a discrimination between evening courses and day courses is unjust to evening students. . . ." [26]

Years later, the ABA's Section on Legal Education and Bar Admissions succeeded in distinguishing between part-time and full-time law schools. They succeeded in furthering the legal profession's goal to promote discriminatory treatment. The rule still exists today.

THE BAR EXAMINER, April, 1932

The April issue included an article titled *"A National Board of Law Examiners"* by Will Shafroth.[27] At this time, although the NCBE's star was on the rise, State Bar admissions were regulated without uniformity amongst the States. This article explored the possibility of a National Board. Shafroth discussed the National Board of Medical Examiners (NBME) and presented it as a model to be emulated by the legal profession. The NBME was organized in 1915 and by 1932 its' certificate was recognized by 41 states as entitling the holder to admission to practice in those states. Shafroth provided information regarding the admissions process in several states in 1932. In Arizona, Arkansas, Florida, Georgia, Indiana, Nevada and Virginia there was no requirement to attend law school. Nor was there a requirement in those states of attending college, or even high school, according to Shafroth's article. In Colorado, Illinois, Kansas, Michigan, Minnesota, New York, Ohio and West Virginia two years of college education were required before entering law school.

The April issue in its section, *"News from the Boards"* disclosed that the Texas Board of Bar Examiners had submitted a rule to its State Supreme Court requiring a high school education, and providing for registration of law students.[28] That would result in the Applicant being subjected to two character assessments. One upon entering law school and the second, upon applying to the Bar.

In the section titled, *"A Layman's Comment on the Rules for Admission in California"* the Bar Examiner disclosed that the California legislature had given power to the State Bar to require a high school education for admission.[29] Chester Rowell, a newspaper writer, cited in the article, wrote as follows :

> "From now on, in California, the law may gradually become a learned profession. . . .Thus we shall have lawyers with the **minimum of education demanded of motor bus drivers,** and **half as well educated as the average service station attendant."**

Contrary to what most Americans believe, becoming a member of the legal profession has only required inordinate requirements within the last several decades. Even in the early 1930s, it was common to become a lawyer without any college education prior to attending law school. Today, the route is typically high school, four years of college, and then three years of law school. Yet, citizens today are no happier with the quality, zealousness or competence of attorneys, then in the 1930s. This is notwithstanding the plethora of restrictions placed in front of the potential attorney as a blockade. More education required than ever. Irrational and immoral character standards designed to exclude everyone except those willing to accede to and support State Bar economic interests. And yet, the attorneys overall, are as crappy as ever. The legal profession today is in lower public repute than ever, although admittedly it has historically never been particularly well regarded or respected. Yet, State Supreme Courts continue to write opinions referring to it as an "honored profession." The Bars lack of regard for historical facts is accompanied by their lack of regard for the public's intellect. When they refer to the legal profession as "learned" or "honored" they insult the intelligence of the public, since no one believes them. The Judiciary "lacks candor" when it makes such statements. It misleads and fails to disclose material facts in a truthful manner.

The April, 1932 issue also contained a section titled, *"French Law Students Protest Against Attempt to Make Admission to Bar Easier."* The NCBE in many issues of the Bar Examiner during the 1930s would provide commentary on admission standards in other countries, when such fulfilled their "wise publicity" objective. Essentially, their purpose was to present examples of restrictive admissions in other countries, or protests against liberalization of admissions, to support their goal of exclusionary admission in the United States. The section on French law students read as follows:

"Ten thousand law students of the Sorbonne and fifteen French provincial universities went on strike . . . as a protest against a recent bill passed . . . making the baccalaureate degree no longer a qualification for taking the examinations for admission to the bar in France. . . . their spokesman stated that if future lawyers are exempted from the baccaulaureate, the profession would be congested with ignoramuses who might elbow out more worthy members. . . .
. . .
The strike lasted but one day but was rather an impressive example of the unity of law students, teachers of law and the bar on the question of qualifications for admission. . . ." [30]

THE BAR EXAMINER, JUNE 1932

An editorial in this issue presented a particularly unique viewpoint. It was a plea to law firms to provide jobs to graduating law students. When I read the beginning of this article, I thought it sounded great. Then the real goal became apparent. The anonymous writer described the reason law firms should help graduating students as follows :

"Moreover, their attitude toward the profession . . . will be shaped largely by their experience of their first years as officers of the court. Not only for the sake of these young men themselves, but for the sake of the profession . . . the practicing lawyers must give these neophytes a helping hand. . . .

The present situation emphasizes the overcrowded condition of the bar. If our practitioners begin to realize this duty which they owe to take care of their young, they will cease to display an attitude of indifference toward the subject of qualifications for admission to the bar; they will become concerned about the large number of schools . . . ."[31]

The proposed concept was as follows. Law student graduates would become protective of the profession and support a restrictive admissions process, if the profession would help them out in the beginning. The new attorneys are referred to as "their young." One big, happy, State Bar family. In a Section titled, "The New York Conference on Legal Education," there appears an interesting point of view from Dean Young B. Smith of the Columbia Law School. The section states :

"Dean Young B. Smith of the Columbia Law School appealed for some plan for the limitation of admission to the law schools of New York State. He made the point that no real progress could be made in keeping out of the bar **those who were inherently unfit** unless some plan of limitation of admission to the law schools was worked out. . . ." [32]

What did he mean by the phrase, "inherently unfit?" The phrase suggests that an individual may be "unfit" no matter what they do in life, since the condition is "inherent." Such being the case, it would seem that Smith was referring to the "inherent" and immutable characteristics of the individual. Their economic position in life. Their race, creed, color, religion, etc.. Another example of the prejudicial notions that infest the Bar and the NCBE. These wrongful notions function as determinative factors in character committee assessments of Bar Applicants. The character standards then become "dangerous instruments," used by the State Bars in an arbitrary and discriminative manner.

BAR EXAMINATIONS and the INTEGRATED BAR,

By Leon Green, Dean of Northwestern University Law School
Bar Examiner, June, 1932 (p.213-222)

Green's article begins as follows:

> " The bar examination as a method of determining the intellectual capacity and fitness of a candidate for admission to the bar has not proved successful. A large segment of the bar which has successfully passed bar examinations is **conceded on all sides to be unfit for professional duties. . . ."**

The question he then poses is whether an integrated bar could offer help. His focus is on inordinately increasing the power, scope and influence of the bar organization generally, and the admissions board specifically. He states:

> "For it is from the bar organization that the board should receive both the spirit which makes the application of its power effective, as well as the support for a detailed administration which would make the exercise of its power acceptable. . . .
>
> Thus, the bar examination board . . . should be recognized as an administrative agency of government drawing its power and support from court, legislative and profession at large."

Green then irrationally suggests the Bar admissions board should function independently of the three branches of government stating:

> "The supreme court or legislature would, as at present, define certain minimum requirements for admission such as age, residence, periods of academic and professional study, and the larger matters of policy. But the putting of these policies into effect should be left as at present within the power of the board. . . .
>
> But at this point I would suggest a wide departure from present practice. It would involve expansion of the board's administrative power and a corresponding shrinkage of the formal examination practice. Administration would be substituted almost entirely for examination. For this purpose the junior bar idea would be made a part of the board's machinery of administration. Instead of giving an examination to every applicant, a provisional license would be granted, say for a period of five years . . . ."

Green's concept of a junior bar was designed to foster control over the attorney, and promote "group thought" notions. It would work as follows. Law school registration would control the prospective attorney from the day he enters law school. The Preceptor component of the Pennsylvania Plan would allow a close watch to be kept on the individual to ensure conformity with the Bar's irrational conception of "moral character." The Junior Bar concept would then keep the leverage in place even after admission was obtained. This has always been the legal profession's goal. Require the individual to constantly be striving for full and complete acceptance at each level. Accomplishing each goal mandates acceptance of conformity and the subjugation of any individualistic ideas that the attorney may have, to the Bar's economic interests and "group thought" goals. Like most of the NCBE's supporters, Green uses the prejudicial notion of "worthy" individuals to forward his anticompetitive goals. He states:

> "Incidentally, the board might well assume the function of advising young men as to their training, and also to assist **worthy ones** in securing financial aids where needed."

He then proposes the elimination of part-time law schools. Those schools were typically institutions catering to economically disadvantaged people. He writes:

> "If such a board existed, with power to rate the schools and to refuse to recognize the unfit ones, any serious undertaking to perform that responsibility would have at least two results : (1) It would cause the elimination very quickly of most of the proprietary schools. . . . **Most of them are menaces to the profession** and the community. At present they are dealt with on a plane of respectability to which they are not entitled because the bar does not appreciate the differences between a well prepared and a poorly prepared product, and bar examinations do not tell the tale." [33]

IS ADMISSION TO THE BAR A JUDICIAL OR A LEGISLATIVE FUNCTION ?

Bar Examiner, June, 1932 (p.222-226)

For the last several decades, Courts have falsely asserted in a variety of opinions that the power to admit attorneys to practice rests with the Judiciary irrefutably. They are not "candid." This anonymous, unauthored article included in the Bar Examiner begins as follows:

> "The decision handed down by the Supreme Court of Massachusetts, on April 20, 1932, **denying the power of the legislature** to compel the bar examiners to mark personally all papers of candidates, has been sent out in pamphlet form to all bar examiners . . . ." [34]

The documented historical fact is that it really wasn't until the 1930s, that the Judicial power to admit attorneys became firmly and perhaps conclusively entrenched in the Judiciary, rather than the Legislature. In fact, it was the propensity of Legislatures to enact statutes in earlier years that claimed the licensing power which was the chief catalyst for formation of the ABA in the 1870s. Between the 1870s and the 1920s, there was extensive litigation on the issue. The Judiciary ultimately prevailed. This is not surprising, since the Judiciary itself was rendering the decisions in those cases. This article quotes the Boston Bar Association's publication, "The Bar Bulletin" as follows :

> "There has come to our attention only one Massachusetts decision, ***Bergeron***, Petitioner, 220 Mass. 472, which seems to bear directly upon the matter. This was a petition for permission to be examined for admission. In deciding that there was no conflict between a certain rule of the Board of Bar Examiners specifying certain educational requirements and a statute dealing with educational requirements, the court, speaking through Chief Justice Rugg, said,
>
> > "It is not necessary to determine the constitutionality of this statute . . . for the reason that the statute does not affect the rule."
>
> **The question, therefore, as to whether admission to the bar is a judicial or legislative function in Massachusetts seems to be left open**, and, it is believed, has never been raised since 1915 . . . .
>
> The development of the judicial thinking throughout the country upon the question has been gradual, but, as the authorities seem to show, in the main toward unanimity of view." [35]

It is clear from the foregoing, the issue of whether admitting attorneys to practice is a legislative or judicial function was "left open" in Massachusetts as late as 1932. Courts today that assert the power has always rested with the Judiciary engage in a false presentation of historical facts. Their bold, self-serving and easily disproven assertions do not reconcile with history. The article further states:

> **"New York in 1881, re Cooper, 22 N.Y. 67; California in 1864, ex parte Yale, 24 California 241 ; and North Carolina in 1906, re Applicants for License to Practise Law, 143, N.C. 1, seem to have decided that the fixing of standards for admission to the bar is a legislative and not a judicial function."**

As late as 1906, the issue was squarely decided against the Judiciary, and two major states New York and California decided the issue against the Judiciary in 1860 and 1864 respectively. Deciding the issue in favor of the Judiciary were Illinois in 1899, New Jersey in 1904, Wisconsin in 1875, Pennsylvania in 1911 and South Dakota in 1909. The Pennsylvania case, *Hoopers v. Bradshaw*, 231 Pa. 485 (1911) is quoted in part, in this Bar Examiner article as follows:

> "Judicial powers and functions are to be exercised by the judiciary alone, and a century ago . . . it was held that the admission of an attorney to practice before a court is a judicial act. **This has never been doubted** or questioned since. . . ." [36]

Was the Court in *Hoopers* being entirely candid? In view of the extensive litigation on the issue, I think it's fair to say that the phrase "This has never been doubted or questioned since" was misleading. The Court presumably was referring only to the fact that the issue had not been doubted in Pennsylvania, since that state's last litigation on the issue was "a century ago." Arizona addressed the issue in the case, *in re Bailey*, 30 Ari. 407 (1929). The Court stated:

> "The Legislature may, and very properly does, provide from time to time that certain minimum qualifications shall be possessed by every citizen who desires to apply to the courts for permission to practice therein, and the courts will require all applicants to comply with the statute. **This, however, is a limitation, not on the courts, but upon the individual citizens, and it in no manner can be construed as compelling the courts to accept as their officers all applicants who have passed such minimum standards. . . ."** [37]

The theory adopted by Arizona in 1929 was previously adopted by Pennsylvania in 1928, and Wisconsin in 1932. It is the standard applied in most states today. The concept relies on the theory that the power to admit rests with the Judiciary, but Legislatures may enact minimum standards, so long as they do not conflict with standards set by the Judiciary. The practical result is that Legislative standards are nullified since they are below the Judicial standards for admission. The Legislative admission standards currently serve absolutely no function, since if they conflict with a Judicial standard, the Judicial rather than the Legislative standard applies. The Bar Examiner quotes the 1932 Wisconsin case, *State v. Cannon*, 240 N.W. 441 as follows:

> "If there are any decisions since 1915 holding that admission to the bar is a legislative function, they have not come to our notice. **It is fairly obvious, we think, that the decided trend of the courts is away from the old theory advanced in New York that lawyers are made by the legislature."** [38]

The Court also stated:

> "It seems unnecessary for us to review the many cases which may be cited bearing upon the question of the right of the legislature to prescribe qualifications for those who shall be admitted to the practice of law. They are exceedingly numerous. . . . **No doubt the leading case in this country holding that the legislature may prescribe the ultimate qualifications for admission to the bar is in re Cooper, 22 N.Y. 67**. **It must be conceded that that is a well-considered case,** but it has not been generally followed in this country. . . ." [39]

This article confirms that the issue of whether the power to admit attorneys rests with the Judiciary or the Legislature was an extremely heated and litigated issue during the late 1800s and early 1900s. In many cases, it was established to be a Legislative function although the victories were short-lived, once the ABA mobilized. The main point is that any State Supreme Court today that asserts the power has been historically unchallenged, simply doesn't know what they're talking about, or alternatively is intentionally trying to deceive the public.

RESTRICTIONS ON REEXAMINATIONS,

By Bessie L. Adams, Of the Carnegie Foundation for the Advancement of Technology
Bar Examiner, August, 1932 (p.267-272)

This Bar Examiner article explores the concept of diminishing the number of attorneys available to serve the public (the Supply side of the economic Supply-Demand relationship that drives pricing), by restricting the number of times an individual who has failed the Bar exam may sit for it again. I am of the belief that a basic American ideal is "if at first you don't succeed, try, try again." Historically, I believe in this nation we love the concept of an individual who never quits, and we applaud them once success is achieved. The State Bars apparently don't subscribe to this theory. Their notion is apparently, "if after the very first few tries you don't succeed, then we don't want you to be an attorney because you are not worthy." The article states as follows:

> "In 20 states . . . there is no restriction upon the privilege of reexamination. . . .
> . . .
> Three of the twenty states listed-Missouri, Texas, and Kentucky--**loom up as outstanding examples of laxity in that they give partial credit in examinations."** [40]

The idea being conveyed is that giving partial credit is an atrocious policy. In fact however, it is the State Bar's failure to give partial credit that is atrocious. Allowing partial credit for passing sections of the exam is an excellent concept. Partial credit is given on the Uniform CPA Examination and there is no doubt that attorneys could learn a lot from Certified Public Accountants. Although, I personally passed all four parts of the CPA exam in one sitting, most examinees do not. Typically, most states give partial credit on the CPA exam for parts passed. The Bar exam itself should also be tougher, and totally objective in order to avoid grading based on subjective opinions of the grader. Providing partial credit would allow Applicants to study specific sections intensively, without fear they were giving up studying in other areas. Those who are exceptional would pass all sections in one sitting. Typically however, passage would require two or more examinations. There obviously should be no limit on the number of times an examinee may sit.

Restrictions on reexamination existed in 15 states in 1932. The restrictions generally consisted of a waiting period to be spent in further study. North Dakota limited reexaminations to four times. Pennsylvania limited the number of times an individual could sit for the exam to three. The concept of a waiting period embodies State Bar irrationality. The longer the Applicant waits, the higher is the likelihood they will forget information learned in law school. The August, 1932 issue in a short section titled, "Kansas Goes on Three-Year Pre-Legal Basis" stated:

> "The Supreme Court of Kansas has recently promulgated the following rule in reference to pre-legal qualifications for admission to the bar:
>
> > "From and after June 1, 1936, the applicant shall show in addition to equivalent of a four-year high school course, the equivalent of three years' study in a general college course."
>
> **Kansas thus becomes the only state in the Union requiring prospectively more than two years of college education . . . ."** [41]

Today, most Bars require a four year college education. Yet in 1932, Kansas was the only State in the entire nation with a rule requiring three years, and that rule would not be effective until 1936.

BAR EXAMINER, SEPTEMBER, 1932

The September, 1932 issue in a small section titled "With a Hey Nonny Nonny and a Hot Cha Cha!" read as follows:

> "We learn from the public prints that Rudy Valle has enrolled as a student at the Suffolk Law School in Boston, with the intention of being admitted to the bar. . . .This notice is published to give all practicing members of the profession ample time to **get a firm grip on their feminine clients."** [42]

The phrase "give all practicing members . . . time to get a firm grip on their feminine clients" is interesting to say the least.

BAR EXAMINER, OCTOBER, 1932

The October, 1932 issue revealed significant information about how the NCBE was being funded during its initial years. In a section titled, "Report of the Executive Committee of the National Conference of Bar Examiners to the Second Annual Meeting" the following was disclosed:

> "Your committee desires to record its grateful appreciation to the Carnegie Foundation for the Advancement of Teaching for its generosity in voting a five-year grant to the Conference in a total sum of $ 15,000, $ 5,000 of which has been available this years, $ 4,000 of which will be turned over to us next year, and $ 3,000, $2,000 and $1,000 in the three succeeding years, respectively."

The Carnegie grant was the main funding source of the NCBE during its' early years. The ABA Section on Legal Education and Admissions contributed $ 2500 on top of the Carnegie grant. By the end of its first fiscal year however, only 9 States had contributed to the NCBE. California led the way with a $ 500 contribution, and Oklahoma second with a $ 150.01 contribution. Connecticut contributed $ 100.00. The remaining six contributing states contributed $ 50.00 or less. The NCBE clearly had a financial problem. When the Carnegie grant ran out, how would they continue funding the organization? The Report included the following on this issue:

> "The diminishing grant given to us by the Carnegie Foundation for the Advancement of Teaching was made in that manner on the theory that **if our organization was of real value to the profession,** it should, in the course of five years, be self-supporting. . . . The National Conference of Bar Examiners has now had a year to prove its value, and if the examining boards of the several states feel that we are justified in continuing as we have begun, it will be necessary for them to secure contributions from the appropriate agencies in their states for this purpose."[43]

The operative phrase is the one that reads, "if our organization was of real value to the profession." Note the term "value" is construed in terms of the profession, not the public. The NCBE was a self-serving organization from day one. The total Receipts on the NCBE's Report for the first year were $ 8,571.89. The highest expenditure was for publishing the "Bar Examiner" at a cost of $ 1947.30. The next highest expenses were Salaries of NCBE members of $ 1426.63, Transportation costs of $ 1400.25, and Meeting expenses for the Executive Committee of $ 796.44. All remaining expense categories were less than $ 300.00 each. The Bar Examiner Section titled, "Progress in Adoption of Bar Standards," in the same issue, read as follows:

> "On September 1, 1921, the lawyers of the United States, acting through the American Bar Association . . . received and adopted the report of a distinguished committee of which Elihu Root . . . was Chairman, advocating certain standards of admission to the bar. . . . At that time Kansas was the only state which had a rule requiring two years of college education, effective in the future, and there were twenty jurisdictions which did not even require any high school education.
>
> . . . At the present time there are nineteen commonwealths . . . where either presently or prospectively two years of college education or their equivalent are required. . . . In addition, in fifteen more jurisdictions the standards of the American Bar Association have been approved by the State Bar Associations. Only nine states remain which still have no requirement of general education."[44]

A sad letter demonstrating the insensitivity of the NCBE is included in a Section titled, "An Interesting Correspondence." A prospective Bar Applicant's uncle wrote a letter to the funding agency of the NCBE, the Carnegie Foundation, and received a disturbing reply. The correspondence is as follows:

"Mr. Alfred Z. Reed
Staff Member of the Carnegie Foundation
. . .

My dear Mr. Reed : --

"May I trouble you to ask for a little information and advice about the U.S. Kent School of Law ?

I have a nephew who is very much interested in taking up the study of law but has not completed his high school education. He is twenty-four years old, his parents are dead and he has to support himself. He, therefore, feels that he cannot take the time to finish his high school education and take two years of college before even starting the study of law. . . . He comes from Maryland and thinks he can take this one or two years of study of law at the Kent School, take the bar examination in Virginia and by studying while practising there for five years he can work up so he can come back to NewYork. He thinks the work and practise along the line he wants will do him as much good as the scholastic training.

This Kent School seems to be the only one where you can study under such conditions. . . .

"I will, therefore, appreciate it very much if you will give me some information and advice about it."

Very truly yours," [45]

Alfred Reed wrote back providing the following irrational advice:

"Dear _____

> "Replying to your enquiry . . . your nephew, at the age of twenty-four, is old enough to make his own decisions. In deciding as to his future education, he might do well to pay some attention to the following considerations :
> . . .
> "I appreciate your nephew's impatience, and sympathize with it. If he were to decide to fulfill the regular requirements for admission to the New York bar, by education received while he supports himself, he will be obliged to postpone his admission for several years. . . ."
>
> "If, none the less, he prefers to try to beat the system, by the method he outlines, **it is only fair to warn him that bar examiners are quite capable of changing the rules of the game on short notice**. . . . But even if he should be qualified, it is entirely possible that by that time the Virginia bar examiners might have so changed their rules that he would not be permitted even to take the examination."
>
> "Similarly, if he pictures his five years of practice in Virginia merely as a part of his education, that will enable him eventually to secure what we might term a **"backdoor" admission** to the New York bar, **he runs the risk that the New York examiners might regard this as an evasion of their rules.** If they and **their allied committees of character** and fitness should so regard it, **and should nevertheless feel technically bound to admit him, they have considerable opportunity to postpone the admission of applicants whom, for any reason, they disapprove. And if they have not already power absolutely to exclude an applicant who comes up by so devious a route, they might acquire this powe**r in time to make short shift of your nephew's ambitions."
> . . .
>
> Very sincerely yours,
>
> Alfred A. Reed" [46]

Reed's letter is incredible in my view. It was published with approval by the NCBE. You have in this situation a 24 year old man trying his best to move forward in life. He is willing to work five years in accordance with published State Bar rules to gain admission. Even though his plan is in accordance with published rules, Reed characterizes his plans as "so devious a route" and an attempt to "beat the system." Reed, apparently with the blessing of the NCBE goes so far as to threaten this potential Applicant, who at the time had no legal training whatsoever. Reed asserts that "bar examiners are quite capable of changing the rules of the game on short notice." He classifies potential admission of this individual as a "backdoor" admission, even though it would be in accordance with existing rules. The most atrocious sentence in his letter is the one that reads:

> "If they and their **allied committees of character** and fitness should so regard it, and should nevertheless feel technically bound to admit him, they have **considerable opportunity to postpone** the admission of applicants whom, for any reason, they disapprove."

Consider the last sentence. Is it sensible or fair to allow the State Bars to have "considerable opportunity to postpone the admission" of an Applicant "for any reason?" Particularly, if the Bar is "technically bound to admit?" In my view if they are technically bound to admit, they lack good moral character by postponing admission "for any reason, they disapprove."

LIGHTS AND SHADOWS IN QUALIFICATIONS FOR THE BAR,

By Dean Albert J. Harno, Address delivered at second annual meeting of the NCBE, October 10, 1932; President of the Association of American Law Schools

Effective utilization of the argument that the legal profession was overcrowded, in order to facilitate the exclusion of qualified individuals from the profession was exemplified in this article. Harno begins as follows:

> "When I was asked to speak before this Conference I readily consented. . . .Why was I given this privilege ? Perhaps the situation bears some resemblance to that which arose, I am told, in a southern community some time ago. A colored minister who was beloved by his people had accepted a call to another church. The Sunday following his departure a member of the congregation arose and spoke : "Bretherns and sisters, you know our pastor Rebend Jones has departed down Mobile way. I move ye dat we pass de collection box to gib him a little momentum."

Harno then addresses "overcrowding":

> "Is the bar over-crowded ? . . . If it should be found that it is, what is the significance of the situation ? With this established, would it follow that steps should be taken to the end that the yearly admissions be decreased ? . . . And if it could, **on what ground can the bar justify taking steps to decrease its members, or to hold them in check,** when such action may have the effect of forcing young men into other lines which are also over-crowded?"

The foregoing is a significant passage. Harno is searching to find grounds to "justify taking steps to decrease its members." He recognizes that decreasing the Supply of attorneys, for the purpose of increasing legal fees is not a saleable concept to the public. It would not be "wise publicity." His true goal is clear. But, it is the justification to be sold to the public that he is looking for. He wants to stem the tide of attorneys at the source, which is the law schools. He states:

> "The point is that the bar examiners, may they labor ever so efficiently, cannot adequately remedy the situation if a tide of poorly trained materials is continually washed up to them. Character and fitness committees cannot do it ; neither can the bar. **The barriers must be located at a more strategic place**. I take it they must be inserted in the schools.
> . . .
> The schools, when they are meeting their responsibilities in that larger sense which I have sought to describe, take cognizance in fitting candidates not only for bar examinations but also for usefulness after the examination as professional members of society."

Barriers. "The barriers must be located at a more strategic place." Harno's message, printed with the approval of the NCBE is clear. He wants to block admissions at their source. Later, his irrational notions are further revealed by his usage of the phrase "anti-social members." The NCBE's "group thought" mentality is the cornerstone strategy He writes:

> "We cannot have a qualified bar, such as we have been describing, unless the bar adopts more effective means than are now being employed to expel from its ranks unprofessional and **anti-social members** --- the tricksters and the shysters.
> . . .

> The bar and the examiners also should assume the responsibility of informing those agencies empowered to raise and improve standards --the courts and the legislatures-- of the problems and needs of the profession ; and, moreover, the **bar should seek to develop a consciousness,** permeating its whole membership, **that whatever is done primarily concerns it and its welfare**, for **we are seeking to improve other agencies in order to improve the bar."** [47]

The second paragraph above is frighteningly incredible. As a preliminary matter, Harno has played the role of a "trickster" himself. He refers to the courts and legislatures as "those agencies." By doing so, he diminishes their stature. Courts and legislatures are not agencies. They are branches of government. What Harno has done is slyly place the branches of government on an even keel with the Bar, which itself is nothing more than a mere agency. He then raises the Bar's prominence above the branches of government by stating, "we are seeking to improve other agencies in order to improve the bar." The "other agencies" he refers to are the Courts and the Legislatures. Their purpose in his irrational view was to "improve the bar." He envisions that the branches of government function for the purpose of improving the Bar. The end result is then that the branches of government play a role of subservience to the State Bar which is elevated to a heightened status.

THE OPPORTUNITIES OF A BOARD OF BAR EXAMINERS,

By Alfred Z. Reed, Of the Carnegie Foundation for the Advancement of Technology
Bar Examiner, December, 1932 - (p.31-49)

It should be recalled that Alfred Reed, the author of this article is the individual who provided the irrational response to the letter from the man attempting to assist his nephew. (See pgs. 68,69) Reed was a prominent member of the Carnegie Foundation which funded the NCBE. This article presents another example of the prejudicial notions manifested in the NCBE. It also provides historical information about the development of the legal profession and how the NCBE was striving to accomplish what other professions had in regards to centralization of power. He writes:

> "Before the Civil War, the only professions in this country that were not open to everybody were law, medicine . . . and, in a few large cities, pharmacists . . . . Even in these three professions, the restrictions, at one time of some importance, gradually diminished, until they ended by amounting to very little. The licensing movement wore especially thin in the case of physicians . . . . There has never been a State . . . in which statutes were not enacted, at an early date, affecting admission to legal practice. The complete absence of effective regulation during the generation before the Civil War was due to defects of detail in the rules themselves expressed either in the statutes or in rules of court adopted--whether or not pursuant to--certainly subsequent to antecedent legislation. . . .
>
> . . . **The notion of a self-governing profession appeared in the early bar admission rules only of New England, and soon disappeared even here, only to be revived, during the past few years**, in a decidedly different form, in the West and South.
> **. . .**
> The seventies mark the real birth of the modern licensing movement, which, since then, has spread to a multitude of occupations. . . . we find that between 1868 and 1878 the first State Board of Bar Examiners was established (in New Hampshire). . . ."

Reed then addresses the "backwardness" of organizing on a national basis by stating:

> "In view of the fact that the concept of restricting admission to practice is older in the law than in any other profession . . . why did we have to wait until last year to see the establishment of a successful national organization of State Boards--nearly fifty years after the dentists, forty years after the doctors . . . .
> **. . .**
> The easiest explanation of the delay is to acribe it to the **ultra-conservatism of lawyers; and if we remove from this explanation any connotation of abuse, there is some truth in it**. . . . It is no insult to members of the legal profession to recognize that they usually prefer to move slowly. . . .
>
> There are, however, two special reasons for the backwardness of American lawyers in this respect: one grounded in the nature of American law, and one in the nature of American rules for admission to legal practice.
> **. . .**
> The first reason why the members of State Board of Bar Examiners have been slow to recognize the mutual advantage that is to be derived from meeting together and exchanging ideas is that state lines affect the principles and rules of law in a manner that they do not affect medical or

engineering science. . . . the substantive rules of law and, to a still greater extent, its procedure vary quite differently from state to state.

. . .

Another factor that has made for disunion has been the development of widely different systems of bar admission. **Immediately before the Civil War, in the great majority of states--in all except nine, to be precise--the single test for admission was ability to pass a bar examination.**

. . .

. . . We have today states which continue to place their sole reliance upon bar examination. We have others in which the examination is open only to those who have studied law during a definite period of years. . . ."

Reed then addresses the issues faced by the NCBE and Bar Boards of Examiners in dealing with Courts and Legislatures. He writes in an incredible passage:

"Before it is possible to convince the legislature, the court, or the self-governing bar -- whatever authority is in control in the particular state-- **the local bar associations and the local law schools must be reckoned with -- their cooperation secured when they will give it, and their hostility discounted when they are wrong.** Above all, their apathy, and the apathy of the controlling authorities, must be shaken. Who can more appropriately begin and **prosecute** this long and painful process than you gentlemen who have been in a position to profit by the experience of others?. . .

If one opportunity among the many that are open to you were to be singled out as preeminent in its appeal, it is that of **regarding yourselves**, not as subordinate operative of the bar admission system that you already have, but **as informed propagandists** for something that is better than this -- **as ministers, if you like, of the true professional gospel."**

What does he mean when he says?:

"the local bar association and the local law schools must be reckoned with?"

He uses the phrase, "reckoned with," to suggest they must be subjugated to the NCBE's irrational ideology. In his irrational view, there are two alternatives. Either "their cooperation secured" or alternatively, "their hostility discounted." He treats the local bar associations and law schools as if they are citizens of a captured foreign country. They are to submit to the new authority or will be "reckoned with." Why does he refer to reforming the admissions process as beginning to, "prosecute this long and painful process?" Who will it be "painful" to? Are their criminals involved? Presumably not, yet why the term, "prosecute?"

If the NCBE notions were rational, then why as Reed suggests should the Bar Examiners and NCBE have a need to consider themselves as "propagandists?" The mere usage of such a term conveys the impression that the purported justifications for change are not genuine. Rather instead, he wants them veiled in propaganda that looks appealing to the public. The NCBE's lust for power and control is manifested in his suggestion that the supporters should consider themselves:

"as ministers, if you like, of the true professional gospel."

It is an unbelievable statement. In his mind, the admissions process becomes a religious cause. They are not merely professionals, but ministers. They are he suggests, prophets of the "true professional gospel." He addresses law schools as follows:

> "The suggestion has recently been made that a compulsory course in legal ethics ought to appear in the curriculum of every law school. Anybody is free to suggest anything to anybody, but nothing, as it would seem to me, could be more unfortunate than for any organization having large powers - - whether of legal control or of moral influence -- to interfere in this way with the curriculum of law schools. . . .
>
> **You have legal power to make any law school go through the forms of teaching anything that you want.** (By "you" I mean, of course, not simply the State Board acting within its specially defined province, but the whole complex of bar admission authorities of which the State Board is the appropriate leader.) But it is just as impossible for you to force adequate teaching of professional ethics upon a reluctant or apathetic law faculty. . . ."

Reed truly believes the State Board of admission has:

> "legal power to make any law school go through the forms of teaching anything that you want."

He was wrong. His position was unsupported by State statutes and rules in existence at the time. He was not candid, and he failed to disclose material facts. He suggests the admissions authority is an organization having large powers of "moral influence." The NCBE however, from a perspective of ethics was itself morally reprehensible. Reed addresses the Bar exam as follows :

> "What do you say to our drawing up an examination in two parts, of which the first . . . is of a character that any graduate of a good law school, if he isn't panic struck or physically below par, ought to be able to pass ; but of which the second part . . . shall test his familiarity with our local, concrete, and **often arbitrary but none the less authoritative rules** of law and procedure?"

This is an important passage because of the phrase:

> "often arbitrary but none the less authoritative rules."

As a matter of constitutional law, the fact is that if they are "arbitrary" rules, they are probably not authoritative, but rather instead are constitutionally infirm. The phrase may fairly be viewed as an admission of guilt. Reed correlates the authority of the admissions Board to the needs of the general public as follows:

> "On the contrary, I think that **it is within the realm of possibility that State Bar admission authorities may sometimes** be obliged to **take a line of action** -- positive or negative -- **which does not, in itself, benefit the profession** except in so far as all lawyers are also members of the public at large. They may even, on occasion, have to consider adopting a policy that is in some degree detrimental to the immediate interests of the profession."

It's an extremely cagey passage. He chose his words carefully. He conveys a message that the admission authorities are looking out for the public's interests, but then at the same time carves out qualifying conditions. He does <u>not</u> say that the admission authorities are obliged to take action in furtherance of the public interest. Rather instead, he says they are obliged to do so, "sometimes" in a

manner that does not "in itself, benefit the profession." He asserts that they may, "on occasion," even "consider" policy that is in "some degree" detrimental to the "immediate interests" of the profession. These are important distinctions. He has slyly written that the profession's interests are paramount. He accomplishes this not by allowing for action detrimental to the profession, but rather instead only allowing for action detrimental to the "immediate interests" of the profession. The concept is that by giving a little in furtherance of the public interest at strategically chosen times, the long-term interests of the profession will be fostered, even if the "immediate interest" is sacrificed to a minimal extent. He addresses the purported issue of an overcrowded Bar (Supply-Demand issue), by strategically exploring whether a minimum limit of attorneys (rather than the standard NCBE argument of setting maximum limits) should be established. Once again, his focus is on the profession, rather than the public:

> "But from the point of view simply of the legal profession, **I fail to see why any downward limit need be set. The fewer lawyers there are, the better it is for them.** And I say this not with any cynical suggestion that the only effect of diminishing the number of lawyers would be to increase, pro tanto, their individual fees.
>
> **. . .**
>
> . . . Theoretically, the legal profession, if left to itself, might go too far in limiting its numbers. Practically, I do not believe that bar admission authorities will ever go too far in this direction."

Reed's article closes with a section titled, "Social and Racial Discrimination." His viewpoints are despicable, overt and in view of the fact they were rubber-stamped by the NCBE, particularly sad. He writes at the end:

> "It has seemed to me that I have sometimes discovered, among high-class lawyers, traces of an emotional reaction against the riffraff with whom they are supposed to have a professional bond. Underneath all their protestations as to education and character, as to quantity or quality, what they really have in mind has sometimes appeared to be this: **The profession ought not to include anybody whom a cultivated gentleman would be ashamed to be seen talking to on the street ; that really is the crux of the problem.**
>
> . . . In some ways, I have great sympathy with their feelings. **But I think that the place to draw social and racial lines of this sort, if anywhere, is at the portals of the bar associations.** Whether any particular selective bar association wishes, or does not wish, to operate on the lines of a gentlemen's club, must, of course, always be left to its now existing membership to decide." [48]

CHARACTER INVESTIGATION,

By John B. Gest, Of the County Board of Law Examiners of Philadelphia County
A Discussion of the Pennsylvania System
Bar Examiner, December, 1932 - (p.51-58)

At first I thought that Gest was jesting in this article, but sadly I was mistaken. He addresses law student registration and character review requirements as follows:

> "We regard the application of registrants as the most important and at the same time the most difficult of all. . . . The difficulty, however, lies in the fact that the character of the applicants for registration is not well formed and the reaction to ethical situations is not pronounced. In this connection, it seems that members of our Board are apt to divide themselves, naturally, into two schools of thought: (a) those whom I might call liberal, who feel that an applicant should not be disqualified on more or less intangible facts in the absence of some definite indication of serious defects of character, and that such an applicant should be given the benefit of the doubt ; and (b) the strict school, who stress the view that the practice of law is a privilege rather than a right and that character examination cannot accomplish the purpose of these rules unless they rather throw the burden on the applicant. . . .
>
> For example, a man who has distinguished himself in school or college, **whose family traditions** are in accord with the highest ideals of professional conduct and who has favorably impressed himself upon citizens of unquestioned reputation **may be passed without hesitation.** . . ."

Read the second paragraph above again. Do you believe it is in accordance with American values? Should Bar admission be predicated on whether your "family traditions are in accord?" Should it matter whether the Applicant has "impressed himself upon citizens of unquestioned reputation" or should the focus be on only the conduct of the Applicant? Should character even be subjected to such detailed review, if the character of licensed attorneys and Judges is not? Here's another interesting passage:

> ". . . We do not believe the sins of the father should be visited upon the son . . . **but if the son of a bootlegger or of a fraudulent bankrupt** has been of such age as to know what was taking place and has been associated, for example, keeping his father's accounts, we have no hesitation in disqualifying him. **One applicant whose father had become a bankrupt** a few years before was asked if he was working his way through college, and he replied that he was going through on the money which his father had saved in the bankruptcy proceeding. . . .
>
> Hypothetical ethical questions are proposed by some members of the Board. The difficulty, however, is, as has been suggested, that "the greatest rogue gives the most pious answer."

The Pennsylvania Plan utilized Preceptors. The duties of the Preceptor were outlined by Gest as follows:

> "During the entire period between registration and taking the final examination, while attending law school, the student is required to keep in touch, by correspondence or otherwise, with his preceptor. The preceptor assumes the responsibility of vouching for the student at the

beginning ; of helping him to understand the ethics, duties, responsibilities, and temptations of the profession ; of endeavoring to develop in the student a high standard of character ; . . . and of certifying, at the end, what he knows of his character and fitness to become a creditable member of the Bar."

Gest closes his article with the following prejudicial statements:

"We believe that the members of the committee who interview the applicant can in some cases **discover his unsuitability and persuade him to withdraw his application,** and, indeed, the fairness of permitting a candidate to withdraw rather than be rejected is apparent, as his disqualification may not always extend to other professions or trades.
. . .
. . .We do feel, however, that something has been accomplished in the rejection of certain applicants. We also believe that the vigilance with which we have watched the incoming applications must have acted as a deterrent to **certain undesirable applicants.** . . ." [49]

The operative phrases are "unsuitability" and "certain undesirable applicants."

A DISCUSSION OF THE OVERCROWDING OF THE BAR

BAR EXAMINER, December, 1932 (p.58)

A small section titled as above, contains the following quote from James Grafton Rogers, Assistant Secretary of State:

". . . The bar has carried on a persistent and, I think, intelligent program of improvement. The trend is all towards more rigid formal standards. **The only argument presented against it has been that the severity of these formal requirements checked the democracy and opportunity of the bar."** [50]

Roger's statement is important for the fact that it exemplifies how the admissions process does not conform with democratic ideals of our nation. His diminishment of this importance by falsely characterizing it as the "only argument" is morally reprehensible.

RECENT BAR EXAMINATION HISTORY IN MASSACHUSETTS,

By William Harold Hitchcock, Chairman Massachusetts State Board of Bar Examiners
Address delivered at second annual meeting of NCBE October 10, 1932

Hitchcock writes about the admissions process in Massachusetts. It had led to immense political friction between the Judiciary and the Legislature. He writes:

> "Your chairman has referred to the recent decision of our Supreme Judicial Court relating to the power of the court over the bar examiners and their activities. . . .
>
> The situation in Massachusetts which led up to this decision has been rather peculiar for a good many years. There had been no decision as to the limits of the judicial and legislative power over admission to the bar and neither the court, the bar examiners, nor the bar cared to bring the matter to an issue. Back in Chief Justice Shaw's day there was some legislation that was inconsistent with the rules of the court. **The court repealed its rules and followed the rules laid down by the legislature.**
>
> **Some twenty years ago, an attempt was made by the Bar Examiners to stiffen the requirements as to pre-law education. That resulted in a legislative enactment setting a low standard of such education. It was deemed best by the court, the bar examiners, and others interested to acquiesce for the time being and not attempt to force a court decision. . . .**
>
> So for many years we went along, not really knowing were we stood as to the definite limits of the jurisdiction of the legislature and the courts . . . .
>
> So our bar examinations for many years have been opened widely to persons with a varying degree of education. . . ."

It is clear from the above passage that the power to admit attorneys was by no means irrefutably a Judicial power, but rather instead there was substantial uncertainty on the issue. Most notably is the phrase:

> ". . . there was some legislation that was inconsistent with the rules of the court. The court repealed its rules and followed the rules laid down by the legislature."

Hitchcock then addresses the character review process:

> ". . . Sometimes as far as an absence of moral character was concerned, we could not, on the evidence, say that he failed to possess such character, but we found that he was close to the line in his marks ; that **his personality,** his education, his entire record which we then had more clearly before us than before from our interview with him, **indicated that he was not qualified in the broad sense of the term to practice law."**

Hitchcock's use of the term "personality" is disturbing. Similarly disturbing is his use of the phrase, "in the broad sense." Such phrases foster character assessment predicated on wrongful subjective notions. They lead to assessment decisions predicated on the ideas, beliefs and family background of the Applicant. If you don't agree with my analysis, consider his later statement on character assessment:

> "Those who are summoned before us are treated in the way that I have outlined. Some of them require a casual consideration. Their records are clean and the marks are high. **They are clean-cut and the type of men we want, no matter what law course they have taken. They are passed as a matter of course."**

Hitchcock becomes indignant writing about when the admissions policy in Massachusetts was challenged. He states:

> "I will now touch on the story of our controversy. In the beginning of this year, in January, after this procedure had gone through two examinations and we were about to apply it to a third, I, for one, was considerably startled to have a **rather violent attack upon the motives and procedure of the Bar Examiners** launched upon us by Dean Archer of the Suffolk Law School. He introduced two bills into the legislature. . . . **Another bill was that no two members of our Board of five members should be graduates of the same law school."**

Should the Bar Examiners of a particular State be allowed to have a large concentration of members from one law school? Here's a great passage on the issue:

> "The first bill to come up was a double-headed one, to the effect that we must not "farm out" the books, and that we must not discriminate between law schools. . . . The next day the action was reconsidered and **the bill substituted omitting only the provision forbidding discrimination, a harmless prohibition since we have no intention thus to discriminate."** [51]

If there was no concern about the discrimination prohibition because it was "harmless," then why was it omitted from the bill?

GERMAN BAR ASSOCIATION FAVORS THREE-YEAR MORATORIUM ON ADMISSIONS TO THE BAR

Bar Examiner, 1933 (p.83)

The Bar Examiner quotes the following:

> "Berlin, Dec. 9 - The German bar threatens to become engulfed in a maelstrom of economic depression which is already menacing the other professions. The "proletarianization" of the bar and "radicalization" of the growing body of law students are some of the menaces envisaged by the leaders of the profession."
>
> **The German Bar Association has just adopted a resolution demanding that for the next three years there shall be no admissions to the bar and that, when this complete closure has been lifted, in 1936, only a limited number of candidates shall be admitted in any year.**
>
> . . . There is strenuous opposition to the measure outside of the legal profession.
> . . .
> Dr. Rudolf Dix, president of the German Bar Association, frankly admits the proposed measure was dictated by depression. He defends it as a stern necessity if the legal profession is to be saved from utter pauperization. . . ." [52]

Remember, when this passage was published in the Bar Examiner, World War II had not yet began. It is remarkably disturbing that the German restriction on Bar admission was presented with approval by the NCBE.

LAW SCHOOLS, BAR EXAMINERS AND BAR ASSOCIATIONS : COOPERATION vs. INSULATION

By Philip J. Wickser, Secretary New York State Board of Law Examiners
Address delivered at the annual meeting of the Association of American Law Schools, Chicago, December, 1932, Bar Examiner, April 1933 ; 151 - 163

Wickser in promotion of the NCBE and Bar Examiner's "group thought" mentality irrationally chastises the diametrically opposed characteristic of individuality as follows:

> "The examining agency also suffers because it is insulated. . . . With the need for a genuine transfusion definitely indicated, **it clings to an individualism more anemic than potent**."

Treatment of the public derived from the "group thought" mentality, he addresses as follows:

> "The profession, whether organized or not, is equally indefinite. It exhorts the public to believe that certain of its affairs can not properly be handled by uninitiated outlanders, the degree of whose incompetence is conclusively established by their failure to get initiated. It especially exhorts the public not to risk being misled and abused by **Philistine instrumentalities such as trust and title companies. In support of this position, it allows the inference to be drawn that there is a solidarity within the profession and the initiated. Its members address each other as brothers, and adopt for the benefit of the outside world the pretense of a collective obligation. The insinuation, is, that immediately upon entrance to this brotherhood, young lawyers will either be found to possess complete capacity, or else that they will be afforded adequate shepherding, both for their benefit and for the benefit of the public.** Unfortunately, the brand of shepherding which they receive is often more lupine than brotherly."

The need to justify the legal monopoly he addresses as follows:

> "It can point out that, to justify monopolistic privileges, the bar, as a group, must show, by its service to society, that it is entitled to more than society pays other skilled labor which it has left unprotected from competition. **Lawyers are not supposed to capitalize their professional talents for competition with the public, which, however, is what they do, by indirection, when they gamble with indigent plaintiffs**. . . . Not that the American public does not enjoy regulating, but it can not understand why a group, which, for over a century, was, technically and socially, so far in the van, should now seem wholly unable to regulate itself, especially **since its members are ushered in with so much ceremony, and, apparently, with such ample certification that they are both superior and honorable beings."**

Note the concept that he presents. Lawyers are characterized as:

> "superior and honorable beings."

What do you think? His conclusion stands on its' own:

> **". . . A storm rages in Germany over a proposal to deny any admission at all to its bar for three years.** The opposition claims that, with other professions and trades following suit, such a measure means a return to feudalism and death to initiative. The proponents reply that further proletarianization of the bar means death to the administration of justice and to the bar itself. Should we in this country risk becoming more truly a guild ? . . . **If this be true, the three agencies we have been considering: the examiners, the schools and the bar, must abandon insulation, effect definite contacts and pool their efforts."** [53]

WHY NOT ADMIT HIM ON MOTION?

Bar Examiner, April 1933, (p.170)

Page 170 of the Bar Examiner in 1933, titled as above, is short and designed to be humorous. I have taken particular care to verify the spelling as printed in the Bar Examiner. Prejudice often manifests itself in humor. This is a good example of tasteless humor at the expense of an uneducated individual. It reads as follows:

"POLICE DEPARTMENT
Oklahoma, Jan. 18, 1933.

Secretary . . . State Bar Dear Sirs

I want tow Get some infermashion reards Licence to Practice Law I red Law years a go in mo and have had Lots of Experence with Law I have Just Served 2 years as Justice of Peace and Poliece Judg of . . . I have red Black Stone and other atharity on Law and Holey and megragor on Criminal Law and have helped to try a number of case and have wone them before a Justice court Lots of my Friends want me to handle thir Suits for them if I just had licence is it Posable For you to fernish Licence to me Please write me and tell what I must do hoping to her from you soon I remain

. . . .Okla

P.S. Some of these young attorney dont want me to get in the Law Bisness I Spoke to one of them and Said what about me Practicing Law Befor the Justice Court and he dident want me to they have a late Law aganst it It usto be you could Practice Law exsept before a Court of Record I havent any Thing to do now and if I had licence I could make a living out of it They wont have me on Public work on account of my age I dont Drink or have any Imorel habits Some and most people think I am a Grate orter" [54]

BAR EXAMINER, MAY, 1933

In an article titled, *"Should the Standards for Bar Preparation Be More Exacting,"* John Wigmore, Dean of the Northwestern University Law School writes:

> "The law student of today will be the law reviser of tomorrow." [55]

He is right. Another article in the same issue titled, "Rule Recognizing Law Study Only in Approved Schools is Sustained by Connecticut Court" addresses a Connecticut opinion that stands for the false proposition that the admission of attorneys is undoubtedly the function of the judiciary. The case, *Jacob Rosenthal vs. State Bar Examining Committee*, (1933) contains much language to this extent. One particular passage of the opinion suggesting otherwise however, caught my eye. The Court wrote:

> ". . . While the determination of the qualifications of attorneys to be admitted to practice in our courts pertains to the judicial department, **the decisions which must be made** in carrying out the procedure established by the rules of the judges to accomplish that end **are not judicial in nature** and may properly be vested in the Bar Examining Committee. . . ." [56]

The Court was attempting to justify its failure to carry out the admissions process directly, and instead delegating it to the Bar. The dilemma this creates is obvious. If in fact, as the Court states:

> "the procedure . . . to accomplish that end are not judicial in nature,"

then the inescapable conclusion is that they do not have to be performed by a judicial agency. They could just as easily be performed by a legislative agency. The Court embarks on an irrational path of logic. On the one hand, they want to establish that the admissions process is undoubtedly a province of the Judiciary, rather than the Legislature. On the other hand however, they don't want to actually perform the duties. To justify nonperformance, they take the position that the procedure is "not judicial in nature."

NEW JERSEY ASKS NEW YORK

Bar Examiner, June 1933 (p.216-220)

In this Section, the Bar Examiner printed a letter of inquiry from Harvey Carr of the New Jersey Bar to John Kirkland Clark. Carr's letter inquires as follows:

> "My dear Mr. Clark :
> . . .
> The Committee is also dealing with a resolution proposing to establish by rules of court a quota system, limiting the number of candidates to be admitted to the bar in any one year . . . .
>
> Some of us feel that the real but not the avowed purpose of the examination is intended to be restrictive of the number. . . .
>
> If you care to express any views on this subject, I should be very glad indeed to have them . . . ."

Clark wrote back as follows:

> "My dear Mr. Carr:
> . . .
> Not infrequently it happens that a candidate has a good grounding in substantive law, but has had no practical experience. . . . Likewise, not infrequently a boy who has been working in a law office proves to be well fitted in the practical branch. . ., but obviously needs further training in substantive law. . . .
>
> . . . I have read with interest and a degree of sympathy the points made by one of your fellow members of the New Jersey Bar as to the injustice of your arbitrary rule. . . .
>
> As to the quota method, the involvements of the problem are so extensive that a determination ought not to be made until the matter has been thoroughly canvassed. . . ." [57]

It was at this time, that the German moratorium on Bar admissions was receiving a great deal of media attention. A strong movement was growing in the United States to adopt a similar policy.

PENNSYLVANIA CONSIDERS ADOPTION OF A QUOTA SYSTEM

Bar Examiner, July, 1933 (p.223-228)

At a meeting of the Pennsylvania Bar Association in June, the question was posed whether the Association should recommend adoption of a limitation in annual admissions. The recommendation was ultimately not adopted, but the following was included in the report:

> "REPORT OF COMMITTEE APPOINTED TO CONSIDER AMENDMENTS TO THE RULES OF THE SUPREME COURT RELATING TO REQUIREMENTS FOR ADMISSION TO THE BAR"
>
> To the President and Members of the Pennsylvania Bar Association:
> . . .
> WHEREAS, under modern conditions, the regulation and control of the members of the Bar . . . is a matter of great practical difficulty, **especially in the larger centers of population** ; . . . .
> . . .
> NOW, THEREFORE, BE IT RESOLVED, That a committee of five members of this Association be appointed to consider the advisability of requesting the Supreme Court to amend its rules for admission to the Bar so as to provide for probationary or partial admission to the Bar, or for admission to practice for stated periods of time, with the right of extension . . . ."

Note the phrase:

"especially in the larger centers of population."

This is where the Bars were focusing their attention, because at this stage in our nation's history, the cities were where most immigrants and minorities were living. The Resolution suggested probationary or partial admission to the Bar. That concept has been bouncing up and down in the State Bars for the last 60 years. The Bar's goal is to exercise control over the lawyer's practice, since the individual is not yet a full and complete member of the Club. If they can leverage the attorney controlling the litigation (by probationary admission), then the Bar can basically control litigation outcomes. Would you want someone representing you who is on probation, when the opposing party has a "full-fledged" attorney? The article contains the following passages:

> "The underlying purpose of the Pennsylvania Plan is to **weed out the unfit and undesirable** applicants at the very inception of their careers, i.e., **before they are admitted to registration as law students."**
>
> "Reciprocally it is believed that the rejection of the unqualified **would be a kindness to them**."

The article concludes:

> "It is therefore the recommendation . . . that such action on their part would be deemed a wise and beneficial one in the interest of the Pennsylvania Bar and of the public." [58]

Note that the public is relegated to a secondary position after the Bar.

REPORT OF THE OREGON COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR

Bar Examiner, September 1933, (p.286-291)

Roy Shield states as follows in defense of the Board of Bar Examiners in Oregon:

> "I think I can truthfully say that it is the most inconspicuous, hardest worked and the **most cussed committee of the bar association.**
>
> **. . .**
>
> Another impediment was the fact that "repeaters" in large numbers were taking the examination year after year on the assumption that we were conducting some sort of an endurance contest. . . In fact we had one faithful old veteran who apparently had heard of Grant's famous siege of Vicksburg, and he took the bar examination 11 times. He seemed to have the notion that if he persisted long enough he might acquire title by prescription.
>
> This situation has been partially amended . . . . **This situation no longer has an appeal to the Scotch instinct of getting as much as possible for the same fee.**
>
> . . .
>
> . . . We feel that this sub-committee of three will be engaged profitably in investigating the general character and personality of the applicant. It will take a great deal of their time to sufficiently familiarize themselves with the **personal record** and legal education of these applicants.
>
> . . .
>
> We also suggest that this sub-committee give some study to the **question of evolving a method whereby those wholly unfit to become lawyers may be discouraged from studying law**. . . ." [59]

JOTTINGS OF A BAR EXAMINER,

By Charles P. Megan, Chairman of The National Conference of Bar Examiners
Bar Examiner, October 1933 - (p.295-306)

This article was written by none other than the Chairman of the NCBE himself. It is an amazing article replete with prejudicial statements, but also contains some passages promoting objectivity, rather than subjectivity. I am forced to concede that I am unclear as to its overall message. At times Megan seems to contradict himself. The passages are nevertheless amazing and I quote the article at length.

> "The bar examiners of the country now have an association. . . . We have also had the good fortune to discover, or develop, at an early stage, our own philosopher. Mr. Wickser is to us what John Locke was to the Whigs in England. . . .
>
> Mr. Wickser's analysis of current presuppositions is deadly, and there is no gainsaying the correctness of his comments on some erroneous ideas that are held by a great many people. . . .
> . . .
> It seems to me that every bar examiner who takes his work at all seriously ought to read a book on examinations written something over fifty years ago by Henry Latham. . . . Here is such an analogy: a suggestion that all answers be marked as usual, and then a mark given for the general impression of the candidate upon the examiner . . . .
> . . .
> One of our problems is the "border-line"case. **Some think we ought to examine the social and cultural "background" of those candidates** that fail . . . .**This can only mean, in practice**,--let us look at it squarely,--**that to him who hath, it shall be given ; a young fellow whose father lives on the North Shore and who has gone to Harvard will pass, on a lower mark** ; . . . .
>
> For those just below the line, we have really launched two questions. Both are familiar ; they shade into each other. An English prime minister who had the appointment of certain judges, stated his policy : when there was a vacant judgeship he filled the place by naming some one who was a gentleman ; and if he knew a little law, so much the better. **I think it was Lord Palmerston who was asked what he would do if there were two candidates for an office, one being the son of an old friend, -- would he appoint him, other things being equal ? "Certainly," said Palmerston, "but other things being equal be damned."**
>
> Let us first glance at the doctrine that the professions should be reserved for "gentlemen" (in the technical sense) ; that is, "back-ground" as an element in admission to the professions.
> . . .
> **Something over three hundred years ago this general question of social background was discussed in the Star Chambe**r. . . .**There are many unfounded stories about bar examinations in Illinois**, but this one has come down with full authentication : The question was asked, "When does a minor come of age ?" One candidate, indignant at being thus trifled with (as he thought) on a solemn occasion, wrote, " **A man who would ask such an absurd question is not fit to be a member of the State Board of law Examiners."**

Megan then gets even more historical:

> ". . . A more appropriate quotation from Bulwer Lytton's novel Rienzi, gives the converse of our case : "See what liberty exists in Rome, when we, the patricians, thus elevate a plebeian."
> . . .
> Aristotle, a firm believer in the aristocratic form of government--but he understood by this, government by the people who really are "best", . . .
>
> **I have not forgotten the problem of the bootlegger's son**. **A young fellow choosing to live in a den of thieves should not be on the roll of lawyers. The point is, that he has sunk into his surroundings. But if he has risen above them, there would be a different answer.**
>
> Aristotle said frankly that there are advantages in having a fine personal appearance and coming from a rich family, but these superiorities should be effective, he insists, only with reference to the business in hand; they have no relevance in what we are talking about, --. . .
> **. . .**
> Yet our examination is strictly impersonal and anonymous. The doctrine of impersonality is based on "a decent respect to the opinions of mankind." Besides, it saves us from laziness, -- we make better questions, and mark better, when we don't know who or what the candidate is,-- whether . . . **a Jew or a Gentile, the son of our friend the judge, or a stranger**. . . . Every proposal to change from the name system to the number system (which conceals the identity of the candidates) has been received with a similar outburst of outraged pride, but I suppose that no board which has once used the number plan would ever go back to the old system. . . .
> . . .
> . . .**we must be careful to retain the confidence of candidates, schools, and public, and avoid even the appearance of evil**. It is, unfortunately, easy to persuade some people that, as the son of a prominent and fine citizen has the proper "background", we shall make no mistake in passing him ; if all people are to be treated alike, we shall have to revise a number of our ideas. . . . **I have noticed anyway that when rules are bent by public officials, the rules tend to yield to the strong, not to the deserving** . . . .
> **. . .**
> In the matter of examinations I am a stern Calvinist. My text to the bar examiners is, Repent before it is too late. . . . We do not always remember that every **bar examination puts us, as well as the candidates, on trial** ; and the jury is of the old-fashioned kind, with its own independent knowledge of the facts, and none too friendly to anything that looks like bureaucracy. . . .
>
> . . . This of course is the chief of the deadly sins of examiners, for if we cannot keep out undesirable candidates, and admit only on merit, our reason for existence is gone. . . .
> . . .
> The world moves, but some bar examiners do not move with it. . . ." [60]

THE PENNSYLVANIA SYSTEM,

By George F. Baer Appel, Secretary of the Pennsylvania State Board of Law Examiners
Address delivered at third annual meeting of NCBE reprinted in Bar Examiner 1933 (p.10-22)

The Pennsylvania Plan applauded by the NCBE as a model to follow was praised again in this article. George Appel in furtherance of promoting an irrational, unfair, subjective admissions process writes as follows:

> "I see that I am listed on the program to make "remarks." This always a dangerous thing to ask any lawyer to do, let alone a secretary of a state board of law examiners. . . . remarks are unlimited, require no conclusions, and offer infinite possibilities for random and possibly illogical thoughts.
>
> . . .
>
> In the first place, I might explain that in Pennsylvania the rules and regulations with respect to admission to the bar are considered part of the judicial functions . . . not of the legislature. It is true that we have statutes on our books regulating admission to the bar, starting with an act in 1722. These acts are all set forth in a case decided in 1928, Olmsted's Case, 292 Pa. 96. . . .Admission to the bar of the Supreme Court of Pennsylvania does not of itself entitle one to admission in the lower courts of the sixty-seven different counties throughout the state. There is a county board of law examiners in almost every county. . . .
>
> . . .
>
> . . . The problems of an examiner fall naturally into two divisions--those relating to registration and those relating to admission. . . .
>
> . . . We should like to feel that we require the equivalent of a college degree--but in all fairness we must admit that it is possible to register on the equivalent of a high school course. I may say that this is in some respects our chief problem. . . . We still feel, although with decreasing intensity, that it should be possible for a boy to register and prepare adequately for the bar without requiring him to attend a college or law school. **We do not necessarily have the feeling that we should keep the door partly open at least for another Lincoln**, although perhaps emotionally some of us still think of an earnest ambitious boy struggling to obtain education and making his legal preparation by candlelight in a small log cabin.
>
> . . .
>
> I will also merely suggest to you my problems in accepting degrees from approved colleges. . . . what colleges should be approved ? . . . what sort of degree should be accepted. . .? **what of the "tramp" student who ends up with a degree at an approved college after three years in various other institutions ? . . .**
>
> . . .
>
> . . . I am satisfied that it is extremely unlikely that an examination can be devised which will unerringly **separate the sheep from the goats**. . . .
>
> Up until October, 1928, we permitted an applicant to take the examinations as often as he pleased. If he failed to pass, it was only because of **extreme dullness**, or because he did not make even half an effort. . . . **Frankly, I do not believe that even in this democratic country, everyone has an inherent right to take the bar examinations until he passes. . . .**
>
> . . .

. . . The marking is likewise the work of experts, tempered by the Board, who bring the point of view of the bar itself. . . . **I have seen too many examples of the benefits from this constant check of attitude** not to be convinced that it is absolutely vital in such a responsible undertaking as is ours.

. . .

. . . **We ask specific questions about the candidate, his family, and his friends.** Of course, the answers are usually biased in the candidate's favor, but, to a certain extent, this bias can be indicated and discounted by requiring the person answering the questionnaire to state whether he is a relative, and just how well he knows the applicant.

. . .

. . . three or four county courts have adopted rules to the effect that irrespective of any qualifications whatsoever, only a certain prescribed number of lawyers shall be admitted annually. . . .As opposed to these facts, however, the Philadelphia Bar Association tabled the suggestion of a quota this spring, and the Pennsylvania Bar Association rejected the suggestion of its committee.

. . .

. . . It is interesting to note that the counties which have adopted the quota in Pennsylvania are those which border on the City of Philadelphia. A feeling of rural antagonism perhaps, . . . may well be the cause of their eagerness to accept what I believe to be a hastily conceived scheme. . . .

. . . Steadily the stream of men, **and now women too**, flows through the portals. . . ." [61]

Following this article, the Bar Examiner magazine contained a Section titled, "Greece to Limit Lawyers." It read as follows:

"The following news item from Athens. . . will be interesting to bar examiners :

"Forcible reduction of the number of lawyers practicing in Greece is the object of legislation now being worked out by Minister of Justice. . . . **Instead of the German method of choking off the stream of aspirants to the professional classes** before they get into the universities, Greece will try to force its too abundant lawyers into special classes of practice. . . .

> . . . the number of lawyers in the whole country will be limited. . . . retirement from practice will be obligatory after an age is reached that the government, with some difficulty, is now attempting to fix. . . ." [62]

It was clear that the NCBE was very interested in the concept of a quota system to limit lawyers, thereby restricting competition, and was fostering significant discussion on the issue. The Bar Examiner then published interesting information pertaining to admission standards of several states in the November, 1933 and December, 1933 issues. Virginia in 1933 had no formal educational requirements of any nature. Nebraska on September 18, 1933 promulgated rules requiring a high school education, and Registration of law students.

The Supreme Court of Missouri on October 16, 1933 asserted the power of the Judiciary over the Legislature to regulate admissions in the case, *Proceedings against Paul Richards for disbarment*, 63 S.W. 2d 672 (1933). The Court stated:

". . . Since the object sought is not naturally within the orbit of the legislative department the power to accomplish it is in its exercise judicial and not legislative, although in the harmonious coordination of powers necessary to effectuate the aim and end of government it may be regulated by statutes to aid in the accomplishment of the object but not to frustrate or destroy it." [63]

The December, 1933 Bar Examiner issue on page 48 contained a Section titled, "Stem Winder Department" which was a reprint from the Mississippi Law Journal, XV, No. 1, p.6. It read as follows:

"Now, what of the ladies? When God made the Southern woman, He summoned his angel messengers and He commanded them to go through all the star-strewn vicissitudes of space and gather all there was of beauty, of brightness and sweetness, of enchantment and glamour, and when they returned and laid the golden harvest at His feet, He began in their wondering presence the work of fashioning the Southern girl. . . . He had wrought the Southern girl." [64]

THE PROBLEM OF CHARACTER EXAMINATION,

Excerpts from a Round Table Discussion Held in Grand Rapids on August 29, 1933 in Connection with Annual Meeting of NCBE
Bar Examiner, January 1934, (p.59-71)

Chairman Bierer, Jr. of Oklahoma begins as follows:

> "The subject assigned this evening for the discussion of this group is Character Examination. While that is probably the most important thing that we have to determine about our applicants, it is, as we all know, the thing about which we know the least from a scientific standpoint. . . .
>
> The old historic method is, of course, familiar and is one which saves wear and tear on the board of examiners. The character committees get affidavits from one or two or three or some specified number of practitioners in his community and probably some outside lay affidavits as to his background, which cause us to believe that his career will be all sweetness and light and that we will never see him before the grievance committee.
>
> . . .
>
> Some of our members who have given a world of thought to this matter tell us, perhaps a little too cynically, that character is directly a matter of response to economic pressure that the individual has to undergo, that we may put the same individual in simple surroundings, where his needs are regularly filled, and that while he may never rise to fame or wealth or greatness, he will have a competency and his character will always be spotless ; and we may put the same individual in a complex surrounding where the economic strife that he has to go through for a living presses particularly hard upon him, and his protective barriers will break down and we will have an undesirable character instead of a desirable character.
>
> . . . I suggest that any system finally developed to examine character must turn in large measure upon such **close, intimate, home inspection of the individual**. Even that kind of inspection so far has been rather undefined . . .and the idea of good, moral character has been taken as a broad and sweeping term, indicating that on one side of the bright line we have the sheep and on the other side the goats.
>
> . . . We are just beginning to look somewhat beyond the ordinary question of the probability as to whether he will lie or steal, and to see whether he has in his makeup those particular qualities of character which will probably in the years to come make him a good advocate . . . instead of a bad one.
>
> Among the states which have gone farthest I think, as generally recognized among bar examiners, in the matter of the development of a real examination localized and more thorough than the usual one, . . . is the State of Pennsylvania. . . .

. . .

Judge James Ailshie, of Idaho:

> "You proceed on the same theory that we do, that a man has a right to reform.

George Appel of Pennsylvania:

> "It is too bad we don't have a qualified admission. . . .

. . .

D.L. Morse of Minnesota:

> **"We don't try to follow any set rule. We consider each case on its own merits."**

. . .
George Appel of Pennsylvania:

> "Ask the applicant facts and then get your opinions from other people."

. . .
George Appel of Pennsylvania:

> "I know of one case where a girl was applying for admission and she had testified in some case as a notary public . . . as to whether the man was at the time competent and knew what he was doing. **The decision of the jury I believe was that the man was competent, but we talked to the judge who heard the case and he told us that, in his opinion, this testimony of this woman was entirely unreliable, and on that basis the County Board refused to admit her."**

Judge Ailshie of Idaho:

> **"Do you think they should have done so after the jury acquitted him and took her word ?**

George Appel of Pennsylvania:

> **"I think so. I think very often the judge is in better position to know**. . . .On the basis of the fact that he thought she was unreliable, the County Board turned her down. Our rejections come **mainly from cases of a bootlegger's son** or a bankrupt's son who changes his father's books and goes out and testifies."

. . .
George Appel of Pennsylvania:

> "It seems to me, no matter how poor a character a boy has, he ought to be told before he starts out to study law and spends money--not only his own but usually his parents'--to educate himself in law, that he should not go any further. I think it is a little unfair to let him come to the final point and then tell him, "You are not fit to be a member of the bar."

. . .
Dean Dickey of California:

> ". . . we have very detailed forms of application for admission, in which questions more searching even than in Pennsylvania are asked. . . ." [65]

Following the Round Table discussion on Character Examination, the January, 1934 issue contained a small section titled, "New Rules Adopted in the Philippines" pertaining to "repeaters" (those who keep taking the Bar exam after they fail) which read as follows:

> "An unusual provision, in reference to repeaters, is as follows: "Duly qualified applicants will not be admitted to more than four examinations; Provided, That any applicant who fails four times will not permitted to take any subsequent examination until he has completed another regular four-year course in an approved law school. . . ." [66]

REPORT OF PENNSYLVANIA COMMITTEE ON ADMISSIONS TO THE BAR

BAR EXAMINER, February 1934 (p.84-86)

More information on the Pennsylvania Plan was presented. It read:

> "During the course of the debate on the Committee's report, the view was pretty generally expressed that, whatever the remedy, it should be effective at the time of application for registration as a law student, so as to prevent those who do not possess the proper attributes from wasting three or four years in a fruitless effort to reach the Bar.
>
> . . .
>
> Reports to your Committee from the local Boards, **particularly in the great centers of population,** show that in many instances personal examination of applicants for registration as law students, and reports to the Boards from investigators, convince the examining members of the Boards that certain individuals, who desire registration, are not of proper character either for the study of the law or for admissions to the ranks of our profession, yet in many such instances the examiners **cannot put their finger on any particular act committed** by the applicant himself which positively disqualifies him to such an extent that, if stated of record, the finding would sustain confirmation by a Board of Review. . . .
>
> The judges of the Courts of Common Pleas throughout the State very generally have placed on the local boards men of discrimination and high standing at the Bar ; with this fact in view, it seems to your Committee that our Association should make the following recommendations to the Supreme Court : **That so much of Rule 9 and of Rule 11 . . . provides that the . . . County Board . . . must set forth "in some detail the reasons for their disapproval" shall be changed to read "setting forth that the applicant does not possess the attributes of character required" . . . .** [67]

The last paragraph is particularly important. It demonstrates the mindset of the Board. They wanted to change the rule requiring them to:

"set forth in some detail the reasons."

The change they wanted was to merely require they set forth:

"that the applicant does not possess the attributes."

The difference is monumental. The rule in existence required the Board to give reasons for denying admission, while the proposed amendment would allow them to reach a conclusion without providing reasons. It is easy to discern that the Board's recommendation would totally purge objectivity from the admissions process. Acceptance of the amendment would allow admission to be denied, even though unsupported by any facts, evidence or reasons.

JUNIOR OR INTERLOCUTORY ADMISSION TO THE BAR,

By Lloyd N. Scott, Secretary of the New York Joint Conference on Legal Education
Bar Examiner, March 1934

The concept of probationary admission was gaining steam. This article described the concept as follows:

> "The object would be to determine whether the assembled qualities of education, **culture**, professional responsibility and moral understanding of the candidate make a man of such a standard as can be entrusted with the administration of justice . . . .
>
> One of the best ways of accomplishing this would be to **require the junior to keep a diary** of his professional activities, so that at the end of the two to five year period, he could refer to it, and on examination, describe the legal work which he had done . . . . Under the Junior Bar plan he would, for a period of two to five years, be drilled in practicing according to the Code of Ethics of the American Bar Association. **This would, no doubt, ever afterwards influence his professional attitude . . . .**
>
> **. . .**
>
> The Federal Courts in New Jersey have now introduced the Probationary Bar in the United States District Court there. . . .
>
> We understand that in New Mexico the Supreme Court authorized certain changes in its rules, one of which institutes the conditional bar there for new attorneys. Indiana, Kansas and North Dakota have also been interested. In New York State the idea is a live one . . . ." [68]

THE PRIVILEGE OF REEXAMINATION IN PROFESSIONAL LICENSURE,

By Bernard C. Gavit, Dean of Indiana University School of Law
Bar Examiner, April 1934 (p.123-128)

If at first you don't succeed, try, try, again ! Definitely not the credo of the NCBE. Reexamination was irrationally considered by the NCBE to be a privilege, not a right. This article presents the NCBE's irrational viewpoints, utilizing extensive comparison between the legal profession and the medical profession. Although the article is ostensibly designed to address Reexaminations, its' scope extends well beyond that subject. The viewpoints are incredible. Note particularly, use of the phrase:

"the vicious American dogma of equality . . ."

That language and other passages come quite close to suggesting establishment of a master race of attorneys to rule the American government. The article states:

> "Last fall The National Conference of Bar Examiners. . . at its annual meeting considered the problem of reexaminations for admission to the bar. . . .
>
> The inquiry was **limited to the more populous states where the problem in legal circles is particularly acute**. . . But I found that apparently the medical examiners had, even there, no problem as compared with the law examiners. . . .
>
> **. . .**
>
> It is thus apparent that the medical profession is years ahead of the legal profession on the subject of licensure. The reasons are not hard to find. The medical profession has succeeded in eliminating to all practical purposes, the commercial medical school. . . .
>
> **. . .**
>
> The medical profession has something more than a vocal belief in its place in society and the professional character of its members. . . . On the other hand the bitter truth is that the legal profession is still given to talk. It is confused by the difficulty of actually choosing between its vocal standard which makes of the lawyer an aristocrat of learning and character, and **the vicious American dogma of equality** which makes every moron a potential lawyer. Standards for admission to the bar lose their vitality in the sentimental glamour of an unreal philosophy as to social existence and human nature. **The only gain which is worth while now is an actual acceptance by the legal profession of its theory as to the superiority of lawyers, and a will to impose the necessary standards for admission to the bar.** In a pioneer society the governmental and social structure could stand the strain of the "self-made" man. . . . It should be apparent to all that **the superiority of lawyers** is a relic of the past unless the **modern race of lawyers** is both **theoretically and actually superior** and that indeed social progress cannot longer be asked to put up with mediocre lawyers.
>
> **I have spoken of the "superiority of lawyers." It is not for the purpose of being facetious.** The truth is that since Chief Justice Marshall wrote into the federal constitution the doctrine of the supremacy of the courts, which doctrine gives the courts the final judgment on all individual and governmental activities, **we have a constitutional acceptance of the superiority of lawyers**. **The doctrine of the supremacy of the courts is based on the lawyer's belief in his**

own superiority ; he alone is qualified to finally direct our experiment in democracy. . . .

. . .

The easiest task in the world is to fashion the ideals of a "rugged individualism" : the next easiest task is to attain those ideals in every day life.

. . .

With good grace we can certainly draw the line against the applicant who fails three times. My opinion is that the privilege of reexamination should, in the usual case, be limited to two repeater examinations.

. . .

. . . Certainly in the legal field it is a necessary expedient, for until the legal system turns to the elimination of the poorer grades of lawyer material through the standard schools some elimination must be effected through the state bar examinations. . . ." [69]

THE HUMAN SIDE OF IT

Bar Examiner, March 1934 (p.117)

An emotionally touching letter written by a Bar Applicant is included in the March 1934 issue. He failed the exam a few times, and then ultimately passed. I present the portions of the letter that convey the strong emotions that he felt upon passing the exam. The reason however for presentation of these passages extends further. A responsive commentary to the letter was published in the April, 1934 issue. After reading the letter and then the response, there is little doubt in my mind that the reader will disapprove of the NCBE. First, the Applicant's letter which was written to the chairman of a board of bar examiners, states in part:

> "Dear Friend :
>
> . . . Since my first failure, last November's Bar, I became a recluse ; saw no one, talked to no one, socially isolated and spiritually degraded. My hope, my life's dream, was dramatically shattered in June, when again I failed.
>
> The first failure entrapped me in a few weeks of ceaseless crying. . . . The second failure just wrapped me in a state of numbness. . . .
>
> You see, dear Sir, if I were to tell you . . . of my young life, you would and could understand the whys and hows. . . .
>
> . . . Life : I was born in Ostrow, Poland. For five years life was good to me. We weren't wealthy, but we did earn a nice livelihood . . . and we were happy. Out of the unknown, 1914 reached out and the plague of war was on. I was then five years old. One brother was fighting on the Russian Front, another on the American and a third, about 16 or 17 years old, playing the game of hide and seek from the Germans. We were forced to wander from the village. It was burned and pillaged. Wandering then, as Gypsies, we . . . lost our mother, brother, and a sister. They died an unwanting death. To tell you of our hunger, starvation and torture in the world war is useless. . . . The aftermath of the war was a million times worse than the war. Famine, pogroms, carnage, cold-blooded murders and robbery. Our American brother got in touch with us, spent every penny he possessed and brought us to America. We reached Ellis Island, May, 1920.
>
> . . . I began my schooling in the 1st grade, at the age of eleven. Time passed. The family was struggling to earn a living, so at the age of 14, in the sixth grade I left school. . . . After working a year I made a comeback in school and graduated from Junior High School . . . with high honors.
>
> Completing City College I desired so much to go to a University but had no funds. I went to New York, got a job as a dishwasher in a summer resort and earned enough for my 1st year's tuition. I entered the University of Baltimore. . . . The family was proud of me ! I was the 1st one in our Family to reach such heights.
>
> But my two Bar Exam failures placed me back where I started from. I was lost. . . a flop! I cried my eyes out. . . .
> . . .

This Thursday, January 11th, about 2:30 P.M., opening my sister's door, I saw her cry. She grabbed me around . . . .

". . . You passed the Bar Exam!"

I collapsed.
. . .

Now, dear Sir, you understand why I am writing this letter, why I am so thankful. . . ." [70]

It is a strong letter that I believe touches the heart. A letter filled with tragedy and triumph. Now here is the response to the letter. This commentary was written by George Nutter of the Committee on Legal Education of the Bar Association of Boston, to Will Shafroth, of the NCBE. It is published on page 144 of the April, 1934 issue of the Bar Examiner:

"Dear Mr. Shafroth :

I have read with much interest the letter in the March issue of THE BAR EXAMINER from the candidate for the bar. . . . But let us look at it from the standpoint of the public. In the first place, the letter shows in its own wording that the great reason for the applicant desiring to become a member of the bar was social prestige. He says "The family was proud of me. I was the first one in our family to reach such heights." But, while this is an honorable ambition, it is not necessarily for the interests of the public that it should under some circumstances be gratified.
. . .
. . . If he were really a good student at the City College and the University, it is somewhat queer that he could not have got into the bar before his third attempt.

Lastly, he made two attempts at which he was unsuccessful, and I think it is a reasonable inference that he did not probably more than get by on his third attempt. . . . **As he . . . has no contacts and no connections with law firms, it is a question whether in an already overcrowded profession he really has done anything more than embark upon a career which satisfies at the outset his ambition but in which he is probably destined to failure. . . . At the same time it seems to me . . . that in a profession, overcrowded as I have said, the public really has no particular need for his services. He probably would do much better if he pursued a business or commercial career.**
. . .

Very truly yours,

George R. Nutter
Chairman, Committee on Legal Education of the
Bar Association of the City of Boston" [71]

As a general rule, I do not use much profanity, although I do use it on occasion. This is a good occasion. George Nutter was a real Prick!

The May, 1934 issue in a small section titled, "Only Small Decrease in Admissions" states as follows:

> ". . . the depression has had only a very slight effect in reducing the number of successful candidates. There has been a very noticeable tendency to make the examinations harder and better, but the number admitted still remains well above nine thousand. . . . **Some comfort can be taken from the fact that the decline in the number of students has been mostly in the poorer schools. . . ."** [72]

The above passage demonstrates that the NCBE's purpose in promoting stricter admission standards was to reduce the number of attorneys, rather than ensure the competency of those licensed. Notice the correlation between making examinations harder, to the number of attorneys admitted, rather than to the competency of those admitted. Also notice the expressed satisfaction attributable to the fact that the decline in students occurred in the poorer schools.

AN ABLER AND A FINER BAR,

By John Kirkland Clark, Chairman of the New York State Board of Law Examiners and Chairman of the Section of Legal Education and Admissions to the Bar of the ABA
Bar Examiner, May, 1934, (p.147-155)

This article was written by a very powerful individual. Clark was Chairman of the ABA Section on Legal Education and Bar Admissions, as well as Chairman of the powerful New York State Board of Law Examiners. The following passage is indicative of his viewpoint:

> ". . . it is certainly worth careful reconsideration as to whether it is not practicable for the other states to assign each law student to an older member of the bar of high standards who is charged with the responsibility of making himself thoroughly familiar with the **personality of the law student, his mental equipment, his social point of view and his ethical concepts**." [73]

Why is Clark concerned with the "personality" of the law student? Why should that even be part of the admissions process? Why does he care about the student's "social point of view?" The introduction of such factors into the licensure process is morally reprehensible.

SUPREME COURT OF LOUISIANA DECLARES ITS POWER OVER ADMISSIONS,

Bar Examiner, May 1934, (p.166-167)

This article is a commentary on the case, *Ex Parte Lester Richard Steckler and Hilary Joseph Gaudin*, (citation not provided by Bar Examiner). The petitioners had claimed a right to admission based on a legislative act of 1855 that conferred upon individuals with a Bachelor of Laws degree from the University of Louisiana the right to practice law. The Court denies that right in an opinion stating:

> **"The power to prescribe ultimately the qualifications for admission to the bar belongs to the judicial department of the government of the state. And each of the three departments of the state government is forbidden to exercise any power properly belonging to either of the others. That is one of the fundamental rules in our form of government**, and is safeguarded in the Constitution of the United States, and in the constitution of every state, and has been vouchsafed in every constitution this state has had, except that of 1868." [74]

The Court misleads the reader of the opinion. There is no fundamental rule in the U.S. Constitution providing the Judiciary with the power to admit attorneys. It is a fundamental rule that no branch may exercise power belonging to the others, but the disputed issue in this case was who the power really belonged to. The Court falsely suggests that the power indisputably belongs to the Judiciary, when in fact numerous opinions in other States had held otherwise throughout the 1800s and the early part of the 1900s. Stated simply, at a minimum it was extremely unclear who the power belonged to. Many State Courts used similarly misleading language in their opinions to seize the power for the Judiciary in the early 1900s. Their concept was that by claiming a power rested with them irrefutably; wresting possession of that power became justified. The Judicial power to admit attorneys was at best one that belonged to the Judiciary by a thin margin. It could properly be exercised by the Legislature without violating constitutional principles. The ultimate determination in most states as a matter of substance, if not form, was predicated simply on which branch was in the best political position to secure the power. The Judiciary being the decision-maker in those cases, possessed the "political position" attribute that allowed them to seize the power.

THE CITIZENSHIP PRIVILEGE

BAR EXAMINER, June 1934 (P.192)

Definitely one of the more unique ways to get into a State Bar. A bit of preliminary information is necessary. The Marquis de Lafayette, a French General in his early 20s, provided invaluable assistance during the American Revolution, serving directly under General George Washington. He became an American hero and was close friends with both Washington and Jefferson. The following was printed in the June, 1934 issue of the Bar Examiner:

> "After a two-year fight . . . Rene A. de Chambrun, great-great-grandson of the Marquis de Lafayette, was admitted to the New York State Bar. . . . Chambrun, Paris-born was banned from practicing his profession because he had never been naturalized as a U.S. citizen. To prove U.S. citizenship de Chambrun cited before the Court of Appeals a law passed by Maryland's General Assembly in 1784 : "The Marquis de Lafayette and his heirs male forever shall be . . . taken to be . . . citizens of this state." [75]

A STUDY OF CHARACTER EXAMINATION METHODS IN FORTY-NINE COMMONWEALTHS,

By Will Shafroth, Secretary, NCBE
Bar Examiner, July-August 1934, (p.195-231)

Shafroth's article presents a character survey of 49 states. He prefaces it with the following statements:

> ". . . These men are well aware that the machine they are using is not a scientific ability-detector. **They also know that it does separate the sheep from the thorobred goats, unless the latter happen to be of a very persistent strain. . . .**
> **. . .**
> It is a sad fact, and one which is comparatively unknown, that there are at least eight or ten states where the only character investigation made is a perfunctory examination of the formal papers which are required to be filed. . . . In perhaps half a dozen other states no definite procedure is followed. . . .
> **. . .**
> Attention is called to the procedure in Pennsylvania, which is more thorough than that of any other state in the Union. . . .
>
> The various states have many different methods of character examination. . . .There are, however, a few things which can be hazarded as essentials of a proper character examination :
> **. . .**
> 3. In all cases **where the candidate is not known personally to one or more members** of the character committee, inquiries should be directed to all his references and past business connections. . . .
>
> 4. Every candidate should be required to appear personally. . . .
>
> 6. Registration at the beginning of law study should be required. . . and the character examination should be conducted at the time of registration, as well as just before the bar examination. . . .
>
> 7. Publication should be made . . . of the names of candidates for admission.
> **. . .**
> . . . The following states seem to give a thorough and conscientious examination to all candidates : Colorado, Connecticut, Delaware, Illinois, Indiana, New Jersey, Pennsylvania, Oregon, Rhode Island and Vermont. . . ."

Shafroth then presents information on individual states. The following provisions of character assessment, I found to be particularly interesting:

ARKANSAS:

> "The applicant taking the bar examination furnishes the secretary a letter with respect to his honor and integrity . . . **his business qualifications**, his moral habits and **his energy** ; and an opinion as to his general qualifications . . . from . . . a judge of a court of record . . . a member of the bar . . . **a practicing physician . . . a banker residing in the state, a businessman . . . and a school teacher. . . .**"

DISTRICT OF COLUMBIA:

> "After the examination the names of the successful candidates are published in the "Evening Star," with **a notice to the public that any information tending to affect the eligibility of any of said applicants on moral grounds be furnished to the Committee of Bar Examiners**. . . ."

FLORIDA:

> ". . . In all instances the applicant must appear in person for an interview, **at which time he is required to answer under oath any and all questions** as to his character and qualifications. . . ."

ILLINOIS:

> ". . . **A file of newspaper reports about students is kept.**"

MARYLAND:

> ". . . **Law students are under continuous supervision** until the date of their admission.
>
> "**A certificate as to habits and character** from two reputable citizens and a personal questionnaire are required from each applicant. . . ."

MINNESOTA:

> ". . . **makes inquiry in the applicant's own community,** and **has the names of the applicants published in a newspaper** of the local county with a request for information as to their character and qualifications."

NEW HAMPSHIRE:

> ". . . If there is any doubt as to an applicant's character, **an investigation is made by the Attorney-General."**

NEW MEXICO:

> ". . . All applicants, including those failing the bar examination, are interviewed personally. . . .
>
> "Candidates for the bar examination must include with their applications a certificate by a reputable person as to moral character."

NEW YORK:

> ". . . may require any additional information as to the character of applicants or **adopt any procedure. . . ."**

OREGON:

> ". . . The applicant, **reliable persons in his community** and his instructors are interviewed. . . ."
>
> "The names of all applicants are published in the Oregon Advance Sheets . . .once a week for five weeks . . . ."

RHODE ISLAND:

> ". . . The questionnaires sent to the citizens include space for reporting the **names of intimate associates of the applicant. . . ."**

TENNESSEE:

". . . the Board makes all possible inquiries by letter and personal investigation, both at the law school of the applicant **and in his community**. . . ." [76]

PUTTING YOUNG LAWYERS ON PROBATION, THE COMMENT OF A LAY SKEPTIC

Bar Examiner, July-August, 1934 (p.240)

The above titled section in the Bar Examiner read as follows:

"At a meeting of the Joint Conference on Legal Education in New York recently it was proposed that the bar be purged of discreditable lawyers by requiring all young attorneys to serve two years on probation.

. . .

The following report by the probationary committee is entirely possible:

Luther Blank - We urge that this young man be given a full membership. In common with thousands of other young lawyers, he had so little business during his first two years that your committee could judge him only by his general appearance asleep in a chair and his reaction to money. His hysteria when shown a dollar by a committeeman disguised as a client was so mild that we think he will be a credit to the bar.

John Smith - We don't know what to say about this young man. After waiting eighteen months for a case he finally got a client who offered him $ 5,000 to represent him in a fraud case. Mr. Smith refused to take the case until he first ascertained whether the client was a crook or not. Ethically he rates 100 per cent, but we are afraid he would embarrass the older attorneys.

Charles Jones - We asked the young man . . . questions:

. . .

. . . If a client offered you a retainer of $ 50,000, would you be concerned about the merits of his case?

The young man . . . answered . . . thusly : "Yes, but for $ 60,000 I would overlook everything."

Edward Brown - This man opened an office exactly two years ago on probation. We visited him this week and found him so emaciated he weighed less than 100 pounds. We think this prima facie evidence of superior honesty as a practicing attorney, and favor full membership and a plate of hot soup." [77]

THE ANNUAL MEETING,

Bar Examiner, October 1934 (p.267)

The Carnegie Foundation grant was running out and the NCBE needed to become financially self-sustaining. The plan was brought forth to perform centralized character review investigation for each of the State Bars when a licensed attorney from one state wanted to become an attorney in another. The above titled article states:

> ". . . The treasurer pointed out that the new plan of the investigation of the character of foreign attorneys by the Conference provided a way out of this difficulty, in addition to performing a valuable public service. He said that if states having an aggregate total of fifty foreign-attorney applicants before next September would turn over to the National Conference the task of ascertaining the past records of those individuals, for the stated consideration of $ 25 an applicant, the organization could continue to function as at present without curtailment of activities, and he urged every examiner who felt the Conference to be a valuable agency in the bar admission field to assist in the effort to secure the adoption of this service in his state." [78]

CHECK-UP ON MIGRANT LAWYERS,

Bar Examiner, October, 1934 (p.274)

The NCBE's plan to seize control of the character review process is described again in this article, which states:

> " ***"Sentence suspended on condition that defendant leaves town before tomorrow morning."***
>
> These police court judgments rendered frequently keep potential misdemeanants on the move. . . . Much the same thing has been going on in respect to lawyers who are caught in scrapes. California has been a chief sufferer. . . .
>
> So it was ruled in California that an applicant for admission who had practiced elsewhere should post a fee of $ 100 to pay the cost of investigating his past. Then, last January, the Bar Examiner . . . proposed that the Conference should serve the examining boards in all states by assuming the labor investigating in such cases. The June number of the Journal reports that California is the first state to accept the offer. The expectation is expressed that other states will do likewise, and, by paying a reasonable fee for the service (exacted from the applicant) afford the Conference a steady source of income.
>
> . . . The Conference will need only to call on its constituent member boards of examiners; authoritative opinions as to the past conduct of migrants will be obtainable, and another hole will be plugged. The work will be financed by fees to be paid by applicants for admission. . . . In New Mexico, several years ago, the State Bar provided for a limited license for one year, during which investigation could be had, and found the rule resulted in discouraging a number of applicants, who moved on to states with lax requirements." [79]

WHAT IS A PER CURIAM DECISION?

Bar Examiner, October, 1934 (p.274)

A small section in the Bar Examiner reads as follows:

> **"California furnishes us with some further information in the way of the following answer to the question, "What is a per curiam decision?": "A per curiam decision is one written by the Clerk of the Court in a case where the judges, for political reasons, do want their names to appear."** [80]

THE STANDARDS OF MEDICAL EDUCATION AND QUALIFICATIONS FOR LICENSURE,

By Walter L. Bierring, President American Medical Association
Presented before ABA Section of Legal Education and Admissions to the Bar, August 30, 1934
Bar Examiner, October 1934 (p.275-284)

The influence of the medical licensure process on the Bar admissions process is evident in the above titled article in the Bar Examiner which reads in part as follows:

> "This program as arranged signifies the co-relationship of legal and medical education and further implies that the problems of the practice of law and of medicine are collateral.
> . . .
> It will always be to the eternal credit of the medical profession that it exhibited the courage and vision to recognize the real state of affairs and determined to set its own house in order. . . . By the elimination of certain schools and the combination of others the number was gradually reduced, and at present there are only seventy-seven Class A or approved medical colleges in the United States and ten in Canada, practically all of them being an integral part of a recognized University. In contrast to thirty years ago, all medical schools now require at least two years of preparation in an acceptable college or university for admission . . . .
> . . .
> As a historical background to the Council's activities it is interesting to recall that when the American Medical Association was formed in 1847 it was specifically stated that one of the chief objectives of the Association was to be the improvement of medical education. . . .
>
> In 1907 the first classification of medical colleges, based on the Council's investigations, was presented and included in its it annual report to the American Medical Association. That classification was not published, but each college was notified of the rating given to it. . . . The second classification prepared in 1910 was published simultaneously with the appearance of the report on medical education in the United States and Canada made by the Carnegie Foundation for the Advancement of Teaching.
>
> **The Carnegie report was written in such a way that it** became news in every part of the land, and **aroused in the public mind a more urgent demand for a higher standard of medical education. . . .**
>
> . . . In the period from 1906 to 1920 the number of medical schools was reduced from 162 to 74. . . .

. . .
Medical training and the practice of medicine have always been closely allied and this relationship finds its best corollary in the evolutionary development of state licensure regulations for the practice of medicine. Both are fundamentally concerned with problems of education.

From the days of the American Colonies to the present, state medical societies or state examining board have maintained the traditional prerogative that each Commonwealth shall determine the requirements for medical practice within its borders.
. . .
With the advent of medical societies, a new mode of regulating medical practice came into being. While medical societies began to appear as early as 1735, they were mostly local and transitory. About the time that the first medical school was founded in Philadelphia, in 1765, the organization of more permanent medical societies began, which had, among other objects, the regulation of medical practice through legislation. The Medical Society of New Jersey was the first to be organized in 1766, and in 1772 legislation was secured requiring examination, and licensure by two judges of the supreme court, with such assistance as they might call. . . .
. . .
A hundred years ago the majority of practicing physicians held medical society licenses, frequently called a diploma, and only a minority were medical college graduates. . . .
. . .
A new movement to advance the standards of licensure, particularly, the type of qualifying examinations, was inaugurated in the formation of the National Board of Medical Examiners in 1915. . . .
. . .
The endorsement of the National Board certificate by forty-two states and three territories is a further indication of an increasing tendency to accept educational requirements for licensure on a national basis." [81]

DEVELOPMENT OF AN ADEQUATE BAR ADMISSION AGENCY,

By Leon Green, Dean Northwestern University Law School
Bar Examiner, November 1934 (p.291-297)

Green discusses his concept of an all powerful Bar admission agency which under his scheme would itself become its' own "Supreme Court." He writes as follows:

> "My criticism of the bar examinations is that they are of little value. They do not strike at the heart of the admission problem.
>
> . . .
>
> I give you one example from Illinois, and let me say here that the Illinois Board of Bar Examiners is one of the best organized in the entire country, and its personnel made up of the highest quality of lawyers. . . .
>
> . . .
>
> Briefly, **the proposal is to broaden the powers of bar examiners so that they are in fact board of bar admission, with full power over the whole process**, subject only to the final supervision of the Supreme Court, and under the general observation of the state bar organization. . . . The board should further have the power of visitation and supervision of law schools. This is the key to the whole problem. **If the law schools are brought under proper control**, the question of intellectual attainments of a candidate for most part takes care of itself automatically. What would you want to know about the schools? . . . to know how they recruit their students. You would require them to supply the records which you should need for your office, without cost to you. **You would want a complete record from the day a student applied for admission to the law school until he left the school.** The medical people already have provided for this sort of thing. The result would be that when the board discovered the methods used in recruiting the student bodies of many of the proprietary schools especially, and when the board discovered the laxity of admission as well as the laxity of requirements of attendance and study, they would set up such minimum requirements that scores of students who now sail through these schools and are admitted to the bar without much difficulty would never be permitted to study law.
>
> . . . All admissions would be upon an *individual* basis. . . . The first license would be a provisional one. . . .
>
> Assuming that a provisional license is granted to a student, the matter of permanent admission should rest upon his performance as a young lawyer over a period of several years. The burden would be upon the young lawyer to build up a record in the secretary's office which would make it possible for his admission to be considered intelligently. **For example, he would be required to make a yearly report on all of his activities as a lawyer. He might give full reports on certain cases that he had handled; reports from his employer, of judges, or opposing lawyers might well be asked.** It would soon become known to clients in general that their **complaints against young lawyers** would be fully considered if they were filed with the secretary of the board of admissions. . . .
>
> . . . **A board so constituted would soon come to have in the matter of admission something of the status of the Supreme Court itself**. There need be no fear of unfairness or partiality on the part of its members any more than would be true of any other judicial body. Such a process of admission would automatically be a cleansing process of the entire bar. In other words, inside of twenty or thirty years you would have a bar which would have been put through the

strainer. . . .

. . . And one of the most attractive phases of the suggestion is that it requires no legislation, no formidable organization. All that is necessary is the approval of the Supreme Court, the general support of the profession, and a willingness on the part of the various board of examiners. . . ." [82]

Note particularly the following phrases that he uses:

"If the law schools are brought under proper control"

and

"For example, he would be required to make a yearly report on all of his activities as a lawyer. He might give **full reports on certain cases that he had handled** . . . or opposing lawyers might well be asked. It would soon become known to clients in general that their **complaints against young lawyers** would be fully considered"

Why the qualification on full consideration of ethical complaints only to "young" lawyers? The reason is that they are the ones who represent the greatest economic threat to the profession's status quo, unless brought under control early in their career.

THE WORK OF A CHARACTER COMMITTEE,

Bar Examiner, November 1934 (p. 299-300)

This article states as follows:

> "A petition was filed with the Supreme Court of Illinois last spring, asking the Court to define the scope of the inquiry which the committees on character and fitness for admission to the bar were charged with making in the state of Illinois. A portion of the brief filed by the Chicago Bar Association in this matter is quoted as being of interest on the general subject of the purpose and methods of character examination."
>
> "Necessity for a Committee on Character and Fitness"
>
> ". . . it is, therefore, all the more important in the public interest that a committee should be in existence and in a position thoroughly **to investigate the personal history of all applicants**. . . .
>
> . . . The number of lawyers . . . has become so great and . . . a large number of them **not particularly well fitted** for the practice of the profession. . . . We do not imply that any arbitrary limitation . . . should be imposed but the experience of the grievance committee . . . **indicates that when the Bar is overcrowded, a strain is placed on the integrity of the members of the profession, particularly those not well fitted** to meet the economic pressure of the times, that would not otherwise exist. . . ." [83]

In considering the above passages, note particularly use of the phrase:

"not particularly well fitted."

Note its subsequent correlation with:

"those not well fitted to meet the economic pressure"

and also its correlation with integrity. The message being conveyed is that economically disadvantaged individuals are of lower honesty and integrity than individuals who are "well fitted" from an economic perspective. It's an extremely prejudicial passage designed to subjugate minorities and immigrants.

A FIRST YEAR BAR EXAMINATION,

By M.R. Kirkwood, Dean Stanford University School of Law
Bar Examiner, December 1934 - (p.315)

This article presents another example of the endless schemes and gimmicks used by the Bars to fortify their economic borders. As you may recall, the Pennsylvania Plan called for subjecting Applicants to two character review processes. One at the law school level, and the second when applying for admission. This article takes the idea into a different direction. It suggests a Bar examination at the law school level and at the admissions level. It reads as follows:

> "If rules now pending before the Supreme Court of California are approved, an interesting experiment in requirements for admission to practice will be initiated. These rules propose that a preliminary bar examination be given at the end of the applicant's first year of law study.
>
> Certain conditions more or less peculiar to the State of California have been the cause of this proposal. It has proved to be very difficult to raise the statutory educational requirements for admission to practice. Thus it has not seemed feasible to require study in an approved law school. . . . the fact is that this state has more law schools than any other state in the Union. . . .
>
> ". . . It has night schools and proprietary schools. . . .
>
> . . . there are schools whose ambition does not rise above getting their students to pass the bar examination. . . ." [84]

The December, 1934 issue reported on "progress" in several states. Washington, Nevada and Delaware had adopted the NCBE's character investigation plan. The January, 1935 issue indicated that Oklahoma and Texas approved the plan. Six states were now using the NCBE for centralized character investigations. The issue also reported that the rule requiring two years of college had been adopted by twenty-five states. The NCBE was securing its goals with incredible success. It was solidifying the economic borders of the profession which was becoming more and more exclusionary. While the profession had always been prejudicial in nature, it now had an effective mechanism to foster and promote such wrongful notions.

A DRAMA OF PROGRESS IN MASSACHUSETTS,

By George Nutter, Chairman Committee on Legal Education, Boston Bar Association
Bar Examiner, January 1935 (p.331-334)

The author of this article is the individual that I described in somewhat less than complimentary terms with respect to the commentary he wrote about an immigrant Applicant who wrote a heart-warming letter about passing the Bar exam. Nutter in this article irrationally describes the dissension over the admissions process in Massachusetts. He enlightens the reader about the Bar's thirst for power when he writes:

> "This drama begins with a prologue which took place in 1915, about a generation ago. At that time the Legislature was supposed to be arbiter of requirements for admission to the Bar. The Board of Bar Examiners . . . went before the Legislature. . . . **A violent controversy arose**, which was **finally terminated by the complete rout of the Board of Bar Examiners**. In place of any part of their plan, there was enacted a statute which prescribed that anyone who had "fulfilled for two years the requirements of a day or evening high school. . . should not be required to take any examination as to his general education." Thus **the dragon of ignorance** was placed in full charge over the field of legal education. The dragon is still there, as the law still stands . . . . But now, after a generation its teeth are gone.
>
> Two years in an evening high school was an absurd requirement : if it had not been serious, it would certainly have been laughable; yet there it stood, apparently a stone wall which no one could climb or get around. . . .Then came a happy conjunction of circumstances and efforts. Some years ago, the Board of Bar Examiners prescribed an oral examination, as well as a written one. . . .
>
> It speedily became apparent that the Board of Bar Examiners could not conduct both a written examination and an oral examination, if they were obliged to read the answers to all the papers.
>
> . . . Opposition developed . . . and a bill was introduced in the Legislature of 1932, to forbid the Board of Bar Examiners to employ readers, and to compel them to do the reading themselves. As this would cripple the oral examination, this bill was opposed . . . . However, . . . the bill was advanced through the various stages until it had passed its third reading. At that time, the Committee on Legal Education made an effort to have this whole question passed upon by the Supreme Judicial Court, and suggested than an advisory opinion might well be asked. . . . As a result, the Court handed down an advisory opinion . . . in which the Court said that any such bill was unconstitutional, on the ground that it was the province of the Court to determine the qualifications of its officers, although the Legislature could fix minimum requirements. This advisory opinion settled the bill, . . . and the opinion itself became widely known throughout the country and met with unanimous approval, except of course in those quarters where opposition to progress is expected.
>
> The way was now open for some advance and a report by the Committee on Legal Education was made . . . which contained recommendations. . . . These may be summarized as follows :
>
> . . .
>
> 5. . . . fix by rule the maximum number of times the candidate might take the examination. . . .
>
> 6. The whole matter of a junior bar. . . .

7. . . . larger appropriation from the Legislature

8. The Board of Bar Examiners of course should have power to deal with exceptional cases, but the whole matter should be embodied in rules. . . .

. . .

The report of the Committee was adopted by the Council. The President of the Association took the matter up with the Chief Justice. . . . The Board of Bar Examiners called a conference of the representatives of all the law schools. . . .The whole matter was considered by the Board of Bar Examiners; they drafted certain recommendations upon which a public hearing was held. . . attended by the same representatives as before, and these recommendations were submitted . . . and are now embodied in rules six and seven of the Supreme Judicial Court. These rules may be summarized as follows :

. . . applicant who begins the study of law subsequent to September 1, 1938, must have completed one-half the work accepted for a bachelor's degree in a college approved by the Board. In legal education every applicant must have completed a course of study in a law school having a three years' course . . . called a "full time" law school, or in a law school having a law course of not less than four years equivalent, in which students devote only part of their working time to their studies. . . ." [85]

FOR THE JUDGES,

Bar Examiner, January, 1935 - (p.334)

A small section titled as above read as follows:

"Bar examination question: Define judicial notice and give three illustrations of its application.

Skeptical candidate**: "Judicial notice means that there are certain facts well known to every thinking person, that even a judge is presumed to know."** [86]

BAR EXAMINER, February 1935

The February issue published that Minnesota adopted the NCBE character plan and was charging Applicants $ 100 for the investigation. The NCBE was charging the Minnesota Bar only $ 25. The net effect was a mark-up of 400%. An interesting controversy was taking place in Indiana, as indicated by the following:

> "The right of the Supreme Court . . . to require candidates for admission to the bar in Indiana to pass a bar examination, was sustained by the Supreme Court. . . . **The court held that the provision of the Constitution of 1851,--that any person twenty-one years of age and of good moral character was entitled to admission to the bar**,--had been repealed at the general election of 1932 when a majority of those who voted on the amendment had favored repeal. This number was less than half of the voters who cast ballots for political candidates. . . which gave rise to the contention that the constitutional provision had not been repealed. The court's refusal to sanction this contention opens the way for a further advance in standards of admission. . . ."

CALIFORNIA DECISION DECLARES POWER OF COURT TO PRESCRIBE REQUIREMENTS,

Bar Examiner, April 1935, (p.382-383)

In this article, discussion is presented about the Judiciary's quest to negate power of the Executive and Legislative branches of government with respect to pardons. California had enacted a "pardon statute" which provided that where a full pardon was granted, it restored a convicted person to all rights, privileges and franchises of which he had been deprived. A proper reading of this article confirms that the Court circumvented the pardon law. It states:

> "The case entitled "In the Matter of the Application of Morris Levine for Reinstatement to the State Bar of California," S.F. No. 15188, was one in which the State Bar opposed the petitioner's application for reinstatement, made on the grounds that the Governor had granted him a full pardon after he had been convicted. . . .
>
> Under the "pardon statute" it is provided that where a full pardon has been granted, it shall operate to restore a convicted person all rights, privileges and franchises of which he has been thereby deprived. **The court held that such a pardon standing alone and unsupported by evidence of moral rehabilitation is not enough and that insofar as the "pardon statute" made such reinstatement mandatory, it was unconstitutional and void as a legislative encroachment upon the inherent power of the court to admit attorneys to the practice of law. . . ."**
>
> Part of the opinion . . . reads as follows:
>
> > ". . . In short, such legislative regulations are, at best, but minimum standards unless the courts themselves are satisfied. . . . **The requirements of the legislature . . . are restrictions on the individual and not limitations on the courts.** They cannot compel the courts to admit to practice a person who is not properly qualified or whose moral character is bad. In other words, the courts in the exercise of their inherent power may demand more than the legislature has required." [87]

A BITTER ENDER,

Bar Examiner, April 1935 (p.392)

The above titled section in the April issue states:

> "Question in an oral examination on Ethics : Assume that you are the District Attorney and are prosecuting a man for murder. The circumstantial evidence is strong. . . and you have every right to expect a conviction. However, . . . evidence unexpectedly comes to your office showing the defendant incontrovertibly innocent. The defense attorneys know nothing about this evidence. Would you advise the court and the defense attorneys of the situation?
>
> The candidate being questioned: " I certainly would not."
>
> The examiner : "And why?"
>
> The candidate : "The dignity of the state is so great that when it once puts a man on trial it should go through with the prosecution regardless of consequences, less the confidence of the people be shaken." [88]

The June, 1935 issue reported that Missouri adopted the NCBE Character Plan. Missouri charged $ 100 to Applicants. The NCBE was still charging only $ 25 to the State Bar, so Missouri was marking up the fee 400%. Eight states now had adopted the NCBE plan and financial solvency of the NCBE seemed assured. The September, 1935 issue reported that 28 states had adopted the two year college requirement. The October issue reported that Florida adopted the NCBE Character Plan.

IMPRESSIONS OF TEN YEARS,

By Charles H. English, Chairman, Pennsylvania State Board of Law Examiners,
Bar Examiner, October 1935 (p.467-473)

Charles English's article manifests wrongful prejudicial notions inherent in the legal profession generally and the NCBE particularly. His article reflects on what he irrationally characterizes as the "progress" of the NCBE. He writes:

> ". . . Then there is the type of student appearing at every examination who quarrels with the question, contending that it is not plainly stated and using up mental energy in this way which might well be devoted to careful searching for a correct answer.
> . . .
> Again, the member of the board sometimes wonders about the law schools. In Pennsylvania for a number of years we have followed the practice of having statistics prepared after each examination. These statistics show the number of applicants from each law school, with the percentage of those who failed and those who passed. We go beyond that and even show the treatment of each particular question by every law school graduate. . . . We learn from experience, therefore, that all law school degrees do not have quite the same authority. . . .
>
> Then again there comes to the mind of the board member the conviction that the public right to competent and honest legal services is paramount ; that there is **no such thing in the individual as the right to practice law**. . . . He will . . . further recall the severe language of one of our great Supreme Court Justices, Justice Sharswood, to the effect that " a horde of pettifogging barristers, custom-seeking and money-making lawyers is one of the greatest curses with which any state or community can be visited."
> . . .
> In considering border-line cases, we, therefore, look at a student's record in law school. **If we find that . . . he has a good cultural background, it is easy for us to conceive that his failure quite to reach the passing mark may have been due to one of the factors of which I have just spoken. In such cases, we do not hesitate to give the student the benefit of the doubt."**

Read that last paragraph again. It's an important one stating:

> "If we find . . . that he has a good cultural background."

You can tell exactly where English is coming from. Later he writes more extensively on the issue:

> ". . . Very often members of local boards felt that an applicant was not fit to practice law because of **various intangible, but none the less real, reasons difficult to assign.** It is not often that a boy of eighteen or nineteen commits a wrongful act upon which the local board could put its finger to prove that he did not have a good character. Nevertheless experienced lawyers on local boards were **frequently convinced from the appearance, from the manner, by the environment**, of an applicant that he would be anything but a good lawyer. . . .
> . . .
> . . . It would be possible . . . for a board to decide readily that where there is present such obvious **deficiencies as want of directness, shiftiness, evasiveness, bad background and the one hundred and one other things which would satisfy a fair mind** that the applicant is not going to make a proper lawyer, to reject him. . . . This authority would have to be carefully administered. The American people are not likely to countenance a system governing so

important a matter as admission to the bar in which through the expedient of fitness tests the bar might seem to become or so attempt to become a select and privileged class shot through with nepotism and kindred evils." [89]

PAGE PRESIDENT ROOSEVELT,

Bar Examiner, October 1935 (p.480)

A small section read as follows:

> "In an examination on Constitutional Law one question required a discussion of the system of "checks and balances." One up-to-date candidate in the course of his answer said that the trouble with that system was there were too many checks and no balances." [90]

GREAT SCOTT!

Bar Examiner, October 1935 (p.480)

The above titled Section read as follows:

> "Bar examination question : Name a leading case decided by the United States Supreme Court and state what principle the case established.
>
> One applicant: "The Great Scott case --established the doctrine that the negro was entitled to the same hotel and train accommodations as the white." [91]

For the reader's information, the Applicant was apparently trying to reference the infamous Dred Scott case which gave judicial approval to slavery, and ultimately contributed to leading this nation into the Civil War. It was a case that became a badge of shame for the United State Supreme Court.

PROBABLY NOT IN CHICAGO EITHER,

Bar Examiner, October 1935 (p.480)

A small section read as follows:

> "Bar examination question: Give the reasons for the rule permitting dying declarations to be received in evidence.
>
> **Candid candidate: "One will not lie in the face of his Maker especially when he is about to meet him. However I do not believe New York follows this rule."** [92]

PHILADELPHIA LAWYERS VOTE FOR LIMITATION,

Bar Examiner, November 1935 (p.20

A small section read as follows:

> "A questionnaire sent to 1760 attorneys of the Philadelphia Bar Association included this query : "Do you approve the principle of limitation of the number of applicants who may be admitted . . . ? . . . A total of 1031 were reported in favor of limitation, compared with 729 against it. . . . **At the meeting of the Association the plan was attacked as un-American and undemocratic and as an admission on the part of lawyers that they could not stand competition. . . ."** [93]

THE CONFERENCE JOINS THE CENTURY CLUB,

The Hundredth Character Investigation is Completed
Bar Examiner, December 1935 - (p.19-28)

This article explained how the NCBE's centralized character process functioned. It states:

> "As soon as the application is received in the office of the Conference, letters are written to all references listed by the applicant and an independent investigation is also initiated. The past employment of each applicant is carefully checked and letters are written his previous associates in the practice of law. In many cases Martindale-Hubbell is asked to give any information it has about him, and inquiries are made of credit associations, bonding companies, character committees, members of bar examining boards, bar association officials, judges of the courts before which he has practiced, the dean, professors or classmates if he has attended a college or law school recently and any other sources from which the Conference believes reliable data may be obtained. If it develops that the applicant has been involved in civil or criminal proceedings, the records are checked. . . .
>
> **. . .**
>
> . . .The cost of conducting the character investigations varies greatly, in rare cases exceeding fifty dollars. . . . **Moreover, the privilege** awarded to a foreign attorney applicant, **of being admitted to practice** on the basis of his previous license, **is one for which he should be able to pay. If he cannot, it is true, . . . he is not a very desirable addition to the bar** . . . ."

The article then provides a sample "CONFIDENTIAL CHARACTER REPORT" which contains the following information given by fictitious references about the Applicant:

> "We have not personally met Mr. Doe, but know that he was a candidate several years ago for Associate Justice of the Supreme Court of State A, but failed to receive the necessary votes to elect."
>
> "**The brother of this party**, . . . has been well known to me for many years. . . ."
> "**He employed women to circulate his petition to get on the ballot**. . . . I also have an indefinite recollection that he was in some financial difficulty. . . ." [94]

COOPERATION WITH LAW SCHOOLS AND THE SUPREME COURT,

By Alfred L. Bartlett
BAR EXAMINER, January 1936 - (p.37-41)

This article contains the following irrational passages promoting the NCBE's unconstitutional notions of the admissions process:

> "In the days when the "older generation" of attorneys sought admission to practice law in this state, a short oral examination conducted in person by the justices of the Supreme Court . . . was deemed a sufficient opportunity for the court to determine the qualifications of those seeking admission . . . . Even the **personal appearance and other phases of the personality** of the applicant were known to have turned the scale in favor of one who was within a narrow margin of failure or success. Such an examination no doubt had its defects, but it afforded one opportunity to which we are willing to subscribe as an essential feature in examining applicants . . . a personal contact between the applicant and the examining authority, with the resulting opportunity of supplementing the examination . . . with regard to the ordinary activities of life. . . ."

Bartlett then considers the applicability of such notions to the contemporary admissions process ("contemporary" being defined as the time the article was written in the 1930s):

> **". . . It would seem to me that in regard to those border-line cases it would be necessary to give the Committee of Bar Examiners an arbitrary discretion, that the Committee of Bar Examiners should not be required to give any reasons or make any statements as to the basis upon which their decision in regard to those few cases was made. Nor do I believe it could be successfully worked out if the Supreme Court granted any reviews of the proceedings of the Committee of Bar Examiners in such cases."** [95]

THE ORAL EXAMINATION,

Bar Examiner, January 1936 - (p.41)

The following passage addresses the maintenance of secrecy of Applicant names during the examination process:

> "The maintenance of secrecy as to the names of those whose papers are being examined eliminates favoritism as well as those activities described by Charles H. English in his paper read at the recent Conference and published last October in this journal, as "mainly political to attempt to exert influence upon board members on behalf of some particular applicant for admission to the bar."[96]

LAWYERS IN THE 74TH CONGRESS: THEIR LEGAL EDUCATION AND EXPERIENCE,

Bar Examiner, January 1936 - (p.42-48)

The nation's legal profession was infatuated with wresting control of the admissions process from the Legislatures which had established a strong foundation in the late 1800s. The profession however did not want to stop there. It also wanted to control the Legislatures themselves by infiltrating them with lawyers. The result would be obvious. Since the Judiciary controlled the lawyers, a successful infiltration of lawyers into the Legislatures, would have the coordinate result of the Judiciary controlling the Legislatures by virtue of the fact they controlled its lawyer-members. Diabolically brilliant, I am forced to concede.

The above titled Section presented statistics on the number of lawyers in the 74th Congress. 70% of the U.S. Senate was comprised of lawyers, including 80% of the Democrat Senators and 47% of the Republican Senators. 65% of the House of Representatives was comprised of lawyers including 68% of the Democrat Representatives and 56% of the Republicans. Think about this. The Judiciary controlled 100% of the Judiciary branch and was able to exercise significant influence by virtue of their licensing power over 70% of the membership in the U.S. Senate and 65% in the House. Total control over one branch, and substantial influence over another. [97]

MARYLAND BAR APPEALS TO COURT FOR HIGHER ADMISSION STANDARDS,

Bar Examiner, February, 1936 (p.51-63)

The issue presented to the Maryland Court was whether standards for legal education should be decided by the Legislature or the Judiciary. It is easy to see that the frequent nature of such disputes confirms that the issue was not so irrefutable as State Supreme Courts falsely led the public to believe. Basic logic mandates that their assertions to the contrary must be viewed as misleading, evasive and embodied by a failure to disclose material information which reflects adversely on their moral character. The article states:

> " This is largely a matter of constitutional law arising out of our very wise separation of the judicial and legislative authority. . . . We do contend with all the earnestness we possess that the Legislature has no constitutional power to control the Courts, and determine who shall be accepted as proper officers of such Courts. The Courts alone have the ultimate right to determine the standards of education, intelligence, ability and character they will insist upon. No legislative enactment can compel the Courts to accept any candidate as a member of the Bar, nor can it prevent the Courts from suspending, disciplining or disbarring any lawyer already admitted. . . .
>
> **. . .**
>
> Suppose, as was done in one of the mid-western States, the Legislature should . . . substitute for it a law that any citizen twenty-one years of age of good moral character should be admitted to the Bar by the Court of Appeals.
>
> Or suppose a law should be passed that no applicant should be refused admission for character disqualifications, unless he should have been convicted of a crime and have served a term of at least ten years in the penitentiary. To say that our Court of Appeals would be bound by such laws is ludicrous, yet in principle there is no difference. . . .
>
> **. . .**
>
> It seems to this Committee that there can be no possible doubt that this Court has the inherent right to prescribe the educational training, both academic and legal, which candidates for admission to the Bar must undergo. . . .
>
> . . . the Committee urges that its power be made operative by appropriate rules of procedure.
>
> **. . .**
>
> The practice of law is a profession, it is said to be a learned profession, and is so recognized in most of the countries of the world.
>
> **. . .**
>
> **. . .There are seventeen States requiring only a high school education. Maryland is in this group. Only four States omit preliminary education. In the four States alone, could the modern and hypothetical Abraham Lincoln be admitted to practice."** [98]

ADMISSION TO THE LEGAL PROFESSION IN ENGLAND,

By Paul H. Sanders, Member of the Texas Bar and Assistant to the Director of the National Bar Program

Bar Examiner, March 1936 (p.75-79)

This article portrays the English legal profession as a model for America to follow. The basic appeal of it to the NCBE was the low lawyer to population ratio (Low Supply and High Demand). Such a low ratio carries with it the corollary result of high legal fees. The article states:

> ". . . There are approximately as many lawyers in Greater New York as constitute the active English legal profession. High standards coupled with heavy expenses, have served to keep the membership of both groups in that country comparatively stationary.
>
> . . .
>
> The four Inns of Court in London . . . constitute the only gateways through which one may proceed to practice at the English bar. . . . A period of "reading in chambers" as a pupil to a junior barrister for a year or more (at a standard cost of $500 per year) is usual before beginning practice. . . . The formal requirements alone, however, take up a minimum of three years' time and cost in the neighborhood of $ 1600 for fees, deposits and government stamps . . . .
>
> . . .
>
> An essential part of the solicitor's training is the period when he is "bound under articles of clerkship" to a practicing solicitor for a period of three to five years. . . .
>
> . . .
>
> Having gained entrance to one of the branches of the legal profession in England the beginner will find a hard path before him. But he would not find it easy to convince his American brother that it is more difficult than in this country when it is observed that in England there are only about forty-seven lawyers to each 100,000 of the population, which means that the legal population is less dense than in any state in the United States. . . . Alabama comes nearest to the English ratio. . . . The District of Columbia has fifteen times as many lawyers proportionately; New York has more than four times as many." [99]

INDIANA AND OREGON RAISE STANDARDS and ADOPT THE CHARACTER PLAN

Bar Examiner, April 1936 (p.95-96)

The Bar Examiner reported in April, 1936 that Indiana and Oregon raised admission standards to require two years of college education and were also going to use the NCBE character investigation program. Thirteen states were using the NCBE character program. This short article includes an unbelievable provision regarding Indiana:

> "The establishment of these standards in Indiana marks a victory of great importance . . . . Until 1931 the requirements for admission to the various courts . . . differed in the respective localities and in many cases the bar examination was only a formality. The first step was to obtain the appointment of a central board of law examiners, which was done in 1931 by the court after the passage of a legislative act giving it the power to regulate admissions to the bar, on the interesting theory that **a person who sought admission to the bar without having enough knowledge to pass a bar examination was not of the good moral character** required by the constitution." [100]

Read the last sentence again. It states:

> **"on the interesting theory that a person who sought admission to the bar without having enough knowledge to pass a bar examination was not of the good moral character required by the constitution."**

It is a perfect example of how the moral character requirement can be perverted to become a "dangerous instrument." Moral character can mean whatever anyone wants it to, in furtherance of their self-serving goals. How can "moral character" be rationally equated with providing correct answers to examination questions? It lacks logic.

LIMITATION ON NEW YORK BAR ADMISSIONS RECOMMENDED,

Comprehensive Survey Reveals Overcrowded Condition of the New York Bar
Bar Examiner, June 1936 (p.115-120)

The strategic attempt to reduce attorneys on the ground that the Bar was overcrowded was designed to increase legal fees. However, the stated purpose to the public was that a reduction of attorneys was necessary to protect them. In this article, the authors carelessly failed to cover up their true intent. Also note that the report is from the Committee on Professional Economics, with the operative term being "Economics." It reads as follows:

> "A finding that the bar of New York County is definitely overcrowded and a recommendation that measures be taken at once for further restricting admissions to the bar of the State constitute two important features of the interesting and valuable report of the Committee on Professional Economics of the New York County Lawyers' Association which has just been filed.
> . . .

The most startling feature of the report is its analysis of the earnings of New York lawyers, which shows that in the year 1933 more than half of the members . . . were earning less than $3,000 each. . . .

. . .

On the subject of overcrowding, the report has the following to say:

"The local bar as a whole is now so overcrowded as to constitute a serious problem to the public as well as to the profession. . . . Therefore we recommend that admission to the bar should be further restricted.

. . .

(b) . . . For example, the local Bar as a whole is overwhelmingly male and white. Yet special considerations may apply to the relative number of women members of the Bar. Similarly special considerations may apply to the relative number of Negro lawyers.

These small classes are in one sense more or less well-defined, with possible special class sympathy or client-drawing power from equally well-defined sections of the community at large.

On general principles we should say as to women that they seem to be under-represented in the local profession, and that many impediments, which seem to discourage them as a class in our profession, are unjustified and can be overcome in proper cases; but many of the obstacles in their way, such as the habits of mind of many lawyers and business clients, present special problems beyond our present scope. . . .

(i) The economic distress of some members of the bar concerns not only those sufferers themselves, but also the bar as a whole and the public. It has a tendency to drive many of the sufferers to unethical acts. . . .

. . .

. . . The excessive competition, induced by overcrowding, forces the handling of work, in wide areas, on a basis less than compensatory. Nor does this spotty existence of low prices redound unreservedly to the public benefit ; since at low prices the client may sometimes receive, as the saying goes, only what he pays for, . . . a disorganized, and unstandardized "market" opens the door to catch-as-catch can tactics, which are not in the public interest. . . .

(n) Further restriction of admissions to the Bar is not inconsistent with democracy. The following observations meet some commonly voiced objections:

> I. . . . The practice of law is a privilege and not a right.
>
> . . .
>
> V. The public is already protected, against extortionate legal charges based upon alleged monopoly, by the standards of well-known court decisions . . . .

. . .

As one method of dealing with overcrowding, the committee recommends in general terms the raising of admission standards and the adoption of a quota system. . . ." [101]

The foregoing reveals in no uncertain terms that the purpose for raising admission standards is to reduce overcrowding in the profession, which causes low legal fees.

IS "RADICAL ACTIVITY" GROUND FOR REFUSING BAR ADMISSION ?

Bar Examiner, April 1936 (p.126)

This small section in the April, 1936 issue, read as follows:

> ". . . On charges of college radicalism, an effort is being made to prevent Aubrey W. Grossman, University of California graduate from taking the oath requisite for the practice of law, it was revealed here yesterday.
>
> Should the Committee on Bar Examiners and the State Supreme Court uphold the contention, the action will be unique in the history of American jurisprudence.
>
> . . .
>
> The American Civil Liberties Union, through its Northern California director, Ernest Besig, announced yesterday they will fight the Legion in its attempt "to make membership in the State Bar depend on political considerations."
>
> They will defend Grossman on three grounds: First, no specific instances of his asserted radical activity have been named. Second, assumption that he will not take the oath in good faith is assuming he will commit crime. Third, even if he were a member of the Communist party, which is not admitted, that is a legal party and therefore membership in it could not be used as a basis for denying him the right to practice law." [102]

BAR EXAMINER, July-August 1936 (p.140-143)

Some interesting items in this issue included the fact that Kansas which in 1921 became the first state to adopt the two-year college requirement, now became the first state to require a full college degree. It would take seven years after high school to become a lawyer in Kansas. Four years of college plus three years of law school, or three years of college and four years of law school.

The same issue reported that Texas and New Hampshire adopted the two-year college requirement. Thirty one states had adopted the two year college requirement. Nebraska issued a decision claiming the Court had the inherent power to determine Bar admissions, rather than the Legislature. A particularly interesting story was on page 143 titled, "Three Jailed in Philadelphia for Conspiracy to Sell Bar Exam Questions." One of the three defendants accused was an individual who had been rejected on character grounds by the Board of Law Examiners because of BOOTLEGGING ACTIVITIES.

QUAKER STATE ADOPTS CHARACTER PLAN,

Bar Examiner, October 1936 - (p.162)

The Bar Examiner reported that Pennsylvania passed a resolution to adopt the NCBE centralized character investigation plan. The following was included:

> 'This action is of particular significance in view of the fact that **it is generally conceded that Pennsylvania leads in the thoroughness with which it investigates and passes on the character of all candidates for admission to the bar**. . . . There are now fifteen states which regularly use the services of the Conference for character investigation . . . ." [103]

PSYCHOLOGY POINTS WAY TO NEW CHARACTER TESTS,

By Oscar G. Haugland, Secretary Minnesota State Board of Law Examiners,
Bar Examiner, October 1936 - (p.165-173)

This article explains the subjective nature of power wielded by Bar Examiners to reject an Applicant on character grounds. It describes the injection of psychological factors into the process. It states:

> "Much has been written in our own Bar Examiner, in the American Bar Association Journal, in other publications devoted to our professional problems . . . concerning moral character and the desirability of determining the presence or absence of that vague trait or combination of traits. . . .
>
> **. . .**
>
> . . . We all know of the procedure in Pennsylvania where comprehensive questionnaires are required of the applicant, his preceptor, and three citizen sponsors at the time of registration for law study, the personal appearance and interview made before the county board at that time, the supervision of or contact with the student by the preceptor during his law study, and the duplication of the initial investigation at the time of application for the bar examination. . . . It seems doubtful, however, that the Pennsylvania method . . . or any of the systems now in operation, provide for as thorough and accurate an investigation as the problem warrants . . . .
>
> **. . . it does seem that applicants may have been disqualified upon evidence which would not be admissible in any legal proceedings.** Thus, one applicant was rejected partially because he was "accused of embezzlement by his employer." Another . . . stated that **"one citizen sponsor was under impression father and possibly son are connected with bootleggers." Another, "Father suspected by creditors in recent bankruptcy proceedings of concealing assets." . . .**
>
> **. . . Thus, Dean Clark, in an address delivered at our 1933 meeting, pointed out that opinions as to the applicant's character, based upon the type of questions asked in even some of our better questionnaires, may constitute judgments resting on nothing more substantial than prejudiced assertions.** He properly concluded that some of these questions were at their best meaningless and valueless and inviting of unsubstantial and unsubstantiated guesses. Our chief difficulty in framing questionnaires arises from the fact that we do not know what we are searching for and if we did we would not know how to go about it.
>
> . . . Dr. Moss, Professor of Psychology at Georgetown University, comments rather pointedly on the reliability of the personal interview in the selection of personnel:
>
> > "In the first place, an interviewer tends to generalize on too few experiences. **If the interviewer has had an unfortunate experience with a red-headed person, he tends to regard all red-headed people with suspicion; if he has been swindled by some one with a hooked nose, he feels that no persons with hooked noses should be trusted ; and if a man of the Jewish race has double-crossed him in the past, he tends to place less confidence in other members of that race."**
> >
> > "Another cause for unreliability of the interview is the widespread assumption that habits are general rather than specific. It is assumed that neatness in one situation will carry over into other situations. Clean hands may be taken to indicate clean morals, and dirty hand, dirty conduct. . . . The fallacy of such assumptions have been demonstrated time

and again. . . . Nervousness on the part of the applicant is sometimes a third cause of unreliability. . . .”

Mr. Shafroth’s report shows that nineteen of the states either publish or post the names of the applicants, or send lists of the names to members of the bar. . . .

. . .

In that part of our field which we are now discussing, however, we are still stumbling along in our own inefficient manner using archaic methods, attempting to cope with a problem for which we possess neither the training, the information nor the experience to handle. . . **Members of examining boards and character committees, however, with no foundations for their opinions other than the fact that they may have struggled with the problem for some years . . . decide the destinies of the applicants who come before them . . . on the validity of their own inexpert conclusions. . . .**

. . .

. . . A psychiatrist tells me that persons possessing improper moral character, in other words, those persons whom we are trying to exclude, are classified in the field of psychiatry as constitutional psychopathic inferiors, grouping in this class pathological liars, pathological drunkards, forgers, thieves, murderers, perjurers, sex perverts, and inadequate personalities. . . . Another psychiatrist, however, says that rarely, if ever, will any members of this class reach us for the reason that by that age they are either in jail or in an institution. . . .

. . .

. . . a man may have a high abstract intelligence, he may do well in school, but he may be lacking entirely in the ability to get along with people which is, of course, often much more important than abstract intelligence. . . .

. . .

The very factors which repel confidence in tests for the measurement of character are those which most strongly impel us to seek aid of this nature. The elusiveness of the qualities which are to be measured, the absence of generally accepted criteria and methods, the lack of opportunity to verify conclusions by subsequent observation . . . demand that our dillettant efforts be at least supplemented by the knowledge and methods, if not by the direct participation, of those persons whose painstaking accumulation and observation of data . . . eliminate to such an extent as the subject matter now permits, the errors which we must concede that we commit.” [104]

THE ORAL EXAMINATION IN MASSACHUSETTS,

By William Harold Hitchcock, Chairman Massachusetts Board of Bar Examiners,
Bar Examiner, November 1936 - (p.3-8)

This article describes interesting aspects of the Massachusetts admissions process. It states:

> "Let me say right here (perhaps the detail is not of very great importance) that the only way we get information in the first instance, at any rate, with reference to character, is by a questionnaire and by letters of recommendation from other members of the Bar. The questionnaire has to be filled out by every applicant ; **it goes into the family and personal history and education**, with various questions as to whether the applicant has been involved in any civil or criminal legal proceedings, the latter **from parking overtime up to murder in the first degree**. . . .
> **. . .**
> . . . Our rules as adopted by the Court requires that notice must be published three times, as a legal notice in one of the Boston papers, thirty days before applicants are sworn in. Then the Boston papers always carry the full list of successful applicants as a news item. . . ." [105]

EDITORIAL, CONDITIONS IN THE PROFESSION,

Bar Examiner, December 1936 - 25-28

This editorial in the December issue demonstrates that the restrictions on Bar admissions were designed to increase profits of existing lawyers, rather than promote the public interest, by curing the so-called problem of "overcrowding." It is more blatant on the issue than other articles. In fact, it can fairly be construed as a "voluntary confession" by the legal profession when it states:

> "The question of what constitutes too many lawyers is one of individual opinion which is not capable of scientific demonstration. . . .
>
> **The real essence of the overcrowding problem lies in the income of members of the bar**, for the reason that whenever lawyers are unable to make a living practicing in an ethical way, there is a strong temptation to resort to ambulance chasing, solicitation of business and commercialization of practice, the evils of which are too evident to require dissertation. **A proper regard for the public interest must cause the members of our profession grave concern where it is apparent that many lawyers are not making a decent living.**
> **. . .**
> . . . With the addition since last fall of New Hampshire, Indiana and Texas . . . there are now thirty-two states which require, either presently or prospectively, two years of college education, or its equivalent . . . .
>
> Four years ago some figures were obtained which showed the impracticability of depending on the bar examinations to screen out unworthy applicants. . . ." [106]

A RECOMMENDATION FROM MISSOURI,

Bar Examiner, December 1936 - (p.28)

The NCBE had succeeded for the most part in coercing states to increase the educational requirements to a mandatory two years college education prior to law study. Now, they wanted more. They wanted to increase it again, this time to four years of college education. A small Section titled as above, read as follows:

> "Your committee recommends to the bar of Missouri that it urge upon the Supreme Court of the State of Missouri the desirability of increasing within the near future its general education requirement from two to four years of college work as a prerequisite to legal education and admission to the bar. . . ." [107]

CHIEF JUSTICE WASTE AND CHAIRMAN RIORDAN ADDRESS NEW LAWYERS,

Bar Examiner, December 1936 - (p.29-30)

This Section contained enlightening information from an address to candidates who passed the bar examination. It states:

> "Mr. Riordan : **Bar examiners are the guardians at the gate of the legal profession.** They are not enrobed in white or crowned with a halo like that great Saint who stands at the celestial portals. On the contrary, **they are more often picture in the minds of those approaching the bar examinations**, and naturally in the minds of those who fail therein, **as garbed in red and crowned with horns**. **Indeed, the bar examiners themselves are seldom allowed to forget that if they are not constantly walking through the regions of the damned, every examination at least heaps fresh coals on their unhaloed heads**. . . .
>
> **The law is a noble profession.** It has furnished most of the great political and social leaders, as well as statesmen, of this country. . . . In no other profession or calling will you find so many who are devoted to the high and patriotic ideals of this government and its founders. In no other field will you find as many who appreciate the heritage of our forefathers. **In no other group-- not even the ministry -- will you find as many who practice the great virtue of tolerance."** [108]

BAR SURVEY SHOWS MUCH UNSATISFIED NEED FOR LEGAL SERVICES,

Bar Examiner, December 1936 - (p.31)

How do you reconcile the Bar's false assertions that the legal profession is overcrowded and the alleged need to increase restrictions on admission need to be increased, with the following excerpt? It states:

> "A published report of the Committee on Cooperation with the Bench and the Bar . . . presents some interesting facts revealed. . . . One of the most striking results of the survey was shown by interviews with laymen in business and private life. Over half the persons visited had problems where the services of lawyers were indicated as necessary or at least desirable, and in the case of business men this was true of ninety per cent of those interviewed. **Two-thirds of the persons in the residential district and sixty per cent of the businesses canvassed were without legal advice."** [109]

A COUNTRY LAWYER'S COMMENT,

Bar Examiner, March 1937 (p.62)

An example of a response to a character inquiry submitted by an attorney, pertaining to a Bar Applicant, was published in the March, 1937 issue. It read as follows:

> "Dear Sir:
>
> Your letter of February 12th . . . relative to the moral character and fitness for the practice of law of John Doe. . . asking as to the extent of my acquaintance and for an opinion.
>
> I know Mr. Doe just as you know a young fellow who has come up in the county, but with whom you have had no occasion to intimate. . . . the family is regarded as an excellent family. His father is one of the respected farmers in the county. The only error that he can be accused of is that he did not wed his boys to the farm where they could have led independent lives. One is our tax collector-- and now this one has "busted loose." I should say his moral character at this time should give no one any concern. After he has been practicing at a congested bar for a few years it might be a different question, the pangs of hunger and the shame of nakedness having a way of working such revolutions in human character. . . . I think it is a rare human being who is fit to practice law who has not had at least five years preparation in a high-grade law school. This young man, I do not think has had anything like that. . . . But what are you going to do? He is a nice kid and if they turn the rest of them loose that way, why not him? . . .
>
> Please do not understand this letter to be any criticism of Mr. Doe for he is all right at the present time. Maybe he will get a government job or be lucky as a real estate operator.
>
> Very truly yours,
>
> 34 years a Pilgrim, who landed on a bare rock" [110]

MINIMUM SENTENCES,

Bar Examiner, March 1937 (p.61)

This small Section contained tidbits designed to be humorous. Three read as follows:

> **"There are only two kinds of women clients; those who pay liberally and those who complain to the Bar Association."**
>
> "Doctors, ministers and lawyers are true to the ideals of their profession only when they try to eliminate themselves."
>
> **"The worst men make the best clients."**[111]

OHIO COURT PROVIDES FOR MORE EFFECTIVE CHARACTER INQUIRIES,

Bar Examiner, May 1937 (p.96)

The May issue reported that a general committee of the Ohio State Bar Association presented suggestions including the promulgation of a rule providing for character investigation of applicants when they start to study law and immediately before they take the bar exam. The Section read in part as follows:

> "In the report . . . the following six advantages were set forth demonstrating the advisability of using the service of the National in reference to immigrant attorneys:
> . . .
> (4) It offers no embarrassment to the applicant who is worthy of admission **but operates as a deterrent to undesirables** who will hesitate to file an application in this state if they are aware of the thorough investigation about to be made." [112]

BAR EXAMINER, July-August 1937

Several small Sections in this issue reported on interesting developments. In a Section titled, *"Empire State Adopts Character Plan"* it was published that New York State became the twentieth state to require an NCBE character investigation for "migrant attorneys." In a Section titled, *"The Need for Broader Legal Education,"* Senior U.S. Circuit Judge Martin T. Manton was quoted as follows:

> "One of the evils with which society has been haunted for sometime is the narrowness of legal education. We have been instructed in the abstractions of law without even considering the social and economic phenomena which give life and substance to that law. **Only of late have our schools come to realize . . . that a study of economics and social conditions is indispensable to a healthy growth of our legal structure."** [113]

Note the increasing emphasis by the NCBE on "social conditions." The admissions process was becoming a mechanism to direct societal behavior extending well beyond the context of litigation. In a Section titled, *"The Obligation of the Law Schools,"* Judge Irving Lehman of the Court of Appeals states:

> "Judge Lehman urged the schools to make more careful selection among applicants. He also suggested that they develop their curricula to stress proper conduct in the profession.
>
> Social philosophy, social relations and social problems should be studied by the prospective lawyer. Judge Lehman declared, because a knowledge of these subjects should be part of his equipment to practice." [114]

In a Section titled, *"Ohio Schools Will Furnish Student's Ranking to the Board"* it was reported that each law school in Ohio would provide a list of its graduates and their ranking, for comparison by the Bar Examiners with their ranking on the Bar examination.

THE FUTURE OF THE PROFESSION,

By Justice L. B. Day of the Supreme Court of Nebraska
Bar Examiner, September 1937 (p.134-142)

This article reads in part as follows:

"Much has been said, especially at bar association meetings, relative to the public opinion of lawyers. One very influential man in an organized state once said : "First, let us kill all the lawyers." **One of our great jurists tells us that even one of our own states, at an early date in our history, passed a single ordinance against lawyers and rum. He reports that some time after they relaxed as to rum but not as to lawyers.**

. . .

More recently, the New York County Lawyers Association attempted to make a comprehensive survey of the condition of the profession in that county, which revealed the most distressing conditions. It was in some measure based upon the average income of lawyers. It definitely indicated that New York County could struggle along with a few less lawyers.

. . .

If any one thinks the assumption that there are too many lawyers is erroneous, he must be in the minority of public opinion. . . .

. . .

Sometimes it is refreshing as well as informative to read back over pages of history. During the French Revolution the lawyers had been suppressed. When Napoleon produced his famous codes the lawyer was reestablished but greatly limited as to number. It is not easily determined whether he advised what legal opinions should be given. **But it is recorded that while the judges were not coerced, they unconsciously knew what opinions were proper**. . . .

Such a scheme is contrary to the spirit of our social life in America. And this is why : There is no sound basis of choice between applicants for admission to the bar. There is no caste here. There are not supposed to be any favorites in America. While the practice of law is a privilege and not a right, it is open to all who conform to our standards.

. . .

. . . **Abraham Lincoln and other successful lawyers have been used as examples that a general education and a legal education were unnecessary in the practice of law**. . . .

. . .

. . . It does not require an experienced educator to know that the graduates of our law schools are lacking in the essential qualifications so necessary to the lawyer. The average graduate would not know how to handle a client if he had one. . . .

. . .

The public suffers most because the overcrowding of the profession in a particular locality leads to unscrupulous practice. . . .

Then again, **too many lawyers in a community cause an era of fee cutting** with the result of careless and inefficient work. Again the public suffers. . . .

. . .

No one realizes better than a member of a state court of last resort that it is the guardian of the entrance to the profession. But the court cannot do more than the . . . profession wish done. . . . **The people of Indiana years ago in their Constitution provided that anyone of good moral character could be admitted to practice law. . . . Recently, however the Indiana Court held**

> **that anyone who attempted to practice law without certain educational requirements was not of good moral character.**
> **. . .**
> No discussion of this subject would be complete without a mention of The National Conference of Bar Examiners. **This organization, nurtured by the Section of Legal Education and Admission to the Bar of the American Bar Association, has in a few years exerted a tremendous influence upon admissions to the bar. . . .”** [115]

BAR EXAMINER, October 1937

In a small Section titled, “The National Conference of Bar Examiner -- Its Accomplishments and Service” written by John H. Riordan Chairman of the NCBE, an interesting passage is contained about the NCBE’s centralized character investigation service. Riordan writes:

> “While State Boards can and do efficiently check the character of local applicants, it is practically impossible for them to conduct an adequate character examination with respect to applicants who come from distant localities in other states. **Herein the “carpet bagger” or migrant attorney ofttimes finds a loophole through which he may enter, notwithstanding the vigilance of the local Board.”** [116]

TURN THE RASCALS UP!

Bar Examiner, November 1937 (p.162)

A small Section titled as above read as follows:

> "Information was received recently by the Secretary of the Conference from an eastern law school that in case a certain young man applied for admission to the bar, important facts concerning him could be furnished by that law school. **This information was relayed to the secretaries of all boards of bar examiners."** [117]

The November, 1937 issue included the "Report of the Treasurer" for the NCBE's fiscal year ended September 16, 1937. Total revenues amounted to $ 5573.52 of which 100% was derived from its character investigation service. The largest expenditures was for Salaries of NCBE staff in the amount of $ 1559.65; Character Investigations in the amount of $ 1,370.84 ; the Bar Examiner magazine in the amount of $ 1149.30 ; and printing and postage in the amount of $ 505.51. No other category exceeded $ 220.00. The same issue also reported that in Colorado and Missouri, Bar Examiners had been elected as State Bar Presidents. Illinois passed a rule distinguishing between law study before 4:00 in the afternoon; and classes taken after 4:00 in the afternoon. That excerpt stated:

> "The rule now makes a distinction between law study before and after four o'clock in the afternoon. If a major portion of the classroom hours in any week are before four o'clock in the afternoon, a student receives credit for no more than 540 classroom hours in any period of one scholastic year ; but if the major portion is after four o'clock in the afternoon . . . no more than 351 classroom hours during the period of one year."

The December 1937 issue reported that a Missouri Bar Committee recommended to the State Supreme Court that it adopt a rule requiring graduation from an ABA accredited law school to sit for the Bar exam. This technique would force the schools to conform to ABA ideological standards. Most particularly, the ABA's "group thought," and anticompetitive directives.

BAR EXAMINER, January 1938 (p.3-6)

In an article titled, "It May Be Epoch-Making," the Bar Examiner reported on developments to implement a uniform National Bar exam occurring in California. That would further enhance the power of the NCBE. Up until this point in time, the NCBE's seven-year existence resulted in most states adopting a two-year college education requirement for admission. In addition, the centralized character investigation service allowed the NCBE to become financially self-sustaining. Two goals had been achieved and the ABA's lust for power was increasing. Numerous proposals for additional reform had been made and a few states adopted law student registration with character investigation, probationary admissions, a junior bar, quota systems, graduation from an ABA approved law school and a four year college education requirement. However, there was no general acceptance of these anticompetitive measures. Adoption of these ideas was haphazard in the 1930s and still is today. The concepts resurface during periods of political conservatism and subside during periods of liberalism.

The January, 1938 issue introduced the foundation for what would years later become the MBE (Multistate Bar Exam). A uniform written Bar examination on various subject areas of law. California was first to promote the concept. California had also been the first state to adopt the NCBE's character investigation program.

CONNECTICUT STATUTE INCREASES POWER OF CHARACTER COMMITTEE,

Bar Examiner, March, 1938 - (p.36)

The Bar Examiner reported on a statute that inordinately and unconstitutionally increased the power of the Connecticut Character Committee. The statute read somewhat incredibly as follows:

> "Sec. 832d. Investigations of qualifications of applicants for admission to the bar. (a) For the **purpose of investigating the moral qualification or general fitness . . . each chairman of any standing committee on recommendations for admission to the bar, in any county shall have power to compel the attendance and testimony before it, . . . of any person who such chairman reasonably believes may have information useful to his committee in such investigation. . . . (b) No such person shall be excused from testifying** . . . on the ground that such testimony . . . will tend to incriminate him, but such evidence shall not be used in any criminal proceedings against him. **(c) If any person shall disobey any such subpoena . . . or, having appeared . . . shall refuse to answer any pertinent question . . . such committee . . . may complain to the state's attorney . . . who, . . . shall forthwith apply to the superior court . . . and said court or such judge . . . shall commit such person to jail until he shall testify. . . ."** [118]

What the Connecticut rule did was unbelievable. Nonattorney citizens who were not even applying to the Bar could be forced to testify before the Bar Committee with respect to an Applicant. The Bar Examiner interview had essentially been transformed into a judicial proceeding affecting everyday citizens. The rule provided that **Nonattorney citizens could be imprisoned** if they refused to cooperate with furthering the Bar's anticompetitive interests.

CHARACTER AND FITNESS,

By William M. James, Chairman of the Committee of the NCBE
Bar Examiner, March 1938 (p.37-41)

This article provides another example of the NCBE's prejudicial notions focusing on assessment of an Applicant's character by evaluating the neighborhood they live in. It irrationally emphasizes the value to the Bar of fabricating allegations of poor character, rather than relying on objective and fair assessment of conduct. The focus of the article on the potential lawyer's grammar school is a bit frightening, particularly in light of the Fascism which had taken hold in Germany by this time. Similarly, the focus on "metropolitan" districts where immigrants concentrated is reprehensible. The article states:

> "The writer is serving his fifth year as a member of the character and fitness committee of the First Appellate Court District of Illinois and his second year as chairman thereof. During this period of servitude he has personally interviewed hundreds of applicants for admission to the bar in Illinois. From this experience he has arrived at certain definite conclusions some of which are hereinafter set forth. . . .
>
> When a man is admitted to the bar, he has run the gauntlet of what is intended to be a selective process. To accomplish the best results each cog in the process must function at its maximum efficiency. **The first step in the applicant's preparation is in the grammar school where, for all anyone knows, every student therein is a potential lawyer. Many eliminate themselves at this early stage in their education.** The next step is in the high school where others disqualify themselves either by voluntarily or involuntarily not completing their high school education. . . . The principal difference between the law schools lies in the degree in which they are guilty. If any moral is to be gleaned from this observation, it is that all law schools should continue with increased vigor their efforts to separate the sheep from the goats and to see that only the sheep graduate. . . .
>
> The final step in the process of selecting candidates for admission to the bar is the inquiry into the applicant's character and fitness. . . .
> . . .
>
> . . . we find the type of applicant who, at least as far as the committee knows, has not committed any positive wrong such as larceny, embezzlement or the like. . . . Furthermore, he is often found to have taken the bar examination four, five or six times before he ultimately succeeds in passing it. It is not uncommon for an applicant in this group to exhibit a lack of candor in dealing with the committee who is investigating his character or in dealing with his fellow men in the course of every day events of his life. Some applicants in this group have had no scholastic difficulties and to all intents and purposes appear to be very intelligent individuals. **However, an investigation among the applicant's friends or in the neighborhood in which he lives may disclose that his habits are bad**. . . . In other words, it cannot be established that he has done something definitely wrong, as for example, committed a crime. Applicants who fall into this group present one of the most difficult problems which confronts a character and fitness committee. . . .
> . . .
> One suggestion which has received considerable support is that the applicant should be required to register with a character and fitness committee before commencing the study of law and

should at that stage of his career be subjected to a preliminary character and fitness examination; that while he is studying law he should be required to keep in contact with the committee with which he has registered. . . . Another suggestion is that character and fitness committees, **particularly in the metropolitan districts**, should have available sufficient funds with which to make a thorough investigation of each applicant. A third suggestion is that character and fitness committees should be given the power to subpoena witnesses and cause them to be sworn." [119]

MICHIGAN STUDIES CHARACTER PROBLEM,

Bar Examiner, March 1938 (p.42-43)

This article focuses on prejudicial notions as indicated by the following:

> "Informal reports concerning the work of the Character Examination Committee of the Detroit Bar Association indicated that the work of the Detroit Committee had apparently resulted in an improved quality of applicants. . . . **This is due not so much to exclusion of applicants found to be unworthy, as from the deterrent effect which the activities of this Committee had exercised upon persons of undesirable character or conduct in the Detroit area**. . . ." [120]

Note the terms "unworthy" and "undesirable."

APPLICANTS FOR ADMISSION TO THE BAR,

By Karl A. McCormick, Proctor of the Bar, Eighth Judicial District of New York
Bar Examiner, March 1938 - (p.44-47)

The following passages are worth consideration:

> "In Ohio **an alliance** has recently been formed between the law schools and the Bar for the **purpose of attempting to cut down the numbers** and improve the quality of those who come to the Bar."

> "A layman, an editor of a middle west newspaper, recently wrote a satirical editorial on the condition of the Bar throughout the country. . . . he suggested the way to solve the problem was to "plow under a third of the crop each year." **This satirical thrust may some day symbolize the attitude of the public who have a way of drastic action when sufficiently aroused. They then might not be satisfied to eliminate one third. They might demand the destruction of the whole crop."** [121]

DIFFICULTIES FACING CHARACTER COMMITTEES,

Bar Examiner, March 1938 (p.48)

Consider the following passage:

> **"Applicants may appear whose appearance . . . give an unfavorable impression, resulting in the conviction that they are not worthy of admission to the bar. . . ."** [122]

BACK DOOR APPLICANTS,

Bar Examiner, April 1938 - (p.52-53)

A letter was received by the NCBE, concerning an Applicant for admission to the Missouri Bar who applied on the basis of previous practice in Arkansas. The names are changed. Consider whether the matters delineated were appropriate for consideration by the Bar. The letter states:

> ". . . On two or three occasions I heard of him soliciting business and it was not long until the rest of the lawyers started staying away from him. He would go for days and never come to his office but would stay around the pool halls and bet on horse races. Mr. Determined at one time borrowed some money from Mr. Lender of this city, and gave him a mortgage on his household furniture. When the note came due, he did not have the money to pay and the mortgage was foreclosed. . . .
>
> I am a young lawyer myself and I know that a young man has a hard time but in my opinion, and the opinion of others here, a man who is getting $ 175 a month from his uncle should surely leave off playing poker and betting on horses if it took all of his money, and his family has to suffer. I have been practicing law seven years and have seen four or five lawyers come into Norton just like Determined, on account of the fact that the bar examination might be a little less hard to pass than some other state. . . . I write this letter with the full knowledge that I am hurting Determined's chance of admittance to the bar in Missouri but I feel that the only way that any local bar can be cleansed of lawyers who don't conduct themselves right as a lawyer or a man is for the other lawyers, . . . to get behind some conference such as yours. . . ."[123]

ANNUAL MEETING OF NATIONAL CONFERENCE,

Bar Examiner, September 1938 (p.115-118)

The NCBE was at it's height. Fascism which had a firm grasp in Germany, also had a hold in America. The NCBE seized the opportunity to capitalize on the public's weakness during the Depression. Nonattorneys, virtually penniless were ripe for the taking by the ABA gang, who sought to economically strangle them for the benefit of attorneys. The NCBE's bubble would burst however, when World War II started. They would experience something they were unaccustomed to. They would not be taken seriously. It would take many years after World War II before they would again reign Supreme and equal their power from 1938-1940. This article written during their first zenith of power, states as follows (Note particularly Standard #5 below):

> "A new chapter in the history of the National Conference of Bar Examiners was written at the annual meeting . . . . Chief attention at this meeting and at the subsequent joint meeting held the next day with the Section of Legal Education and Admissions to the Bar was devoted to the character problem. . . .
>
> A committee . . . presented a report which was adopted first by the Conference, then by the joint meeting and finally by the House of Delegates of the American Bar Association. . . .
>
> . . .
>
> The standards of character examination adopted were as follows :
>
> 1. The applicant should be required to register at the beginning of law study and at that time submit to an examination of his character and fitness.
>
> 2. That further study be made of the desirability of each applicant upon commencing the study of law assigned to a sponsor in the locality in which the applicant lives. . . .
>
> . . .
>
> 4. Character and fitness committees should have the power to cause oaths to be administered and witnesses to be subpoenaed.
>
> 5. Each applicant, **particularly in the metropolitan districts,** should be interviewed personally.
>
> . . .
>
> 8. Just before taking the bar examination the applicant should be required to submit to a final examination into his character and fitness.
>
> . . .
>
> 10. In each jurisdiction the court, legislature or other group which has control of admission to the bar should be encouraged to continue a study of the problem with the view of obtaining better cooperation in setting up the necessary machinery, and . . . getting the proper cooperation between the group which determines the requirements for admission to the bar and those appointed to inquire into the character and fitness of applicants.
>
> . . .
>
> . . .Dean Andrews referred to the difficult problems which the bar is facing today and in assessing its ability to cope successfully with the present difficulties he cast up a balance sheet of assets and liabilities. As assets he listed the ideals of the profession, the large number of lawyers who will not compromise these ideals, the great fund of enthusiasm and idealism possessed by the law school graduates going into the bar, the higher standards of legal education and the

requirements for admission which are now found in the great majority of the states, the incalculable amount of work done by bar examiners, character committees and bar associations, and the large amount of leadership lawyers are giving in government, politics and business. . . .But there are also liabilities, including an unfavorable press, a small minority of unethical practitioners who breed cynicism in the ranks of the neophytes, a frequent failure to exclude the unfit or to discipline the unethical. . . .

. . .

. . . He referred to the question of how we are to have worthy lawyers as one of supreme concern to the profession. . . .**In the ranks of the English and Scottish bar there is a very fine esprit de corps and the man who offends against the professional ideals soon finds himself mistrusted and shunned by his brethren of the bar and by the benchers of his Inn.**

Lord Macmillan referred to the diverse chapter of our admission requirements and examinations in America and stated that in his opinion the gateway to the bar should be nation-wide rather than state-wide, and the **spirit of the profession. . . must also be nation-wide**. This spirit he said was the most potent means of promoting the traditions of the profession. This spirit is promoted in England by the requirement that the aspirant for a call to the bar of England has been required to eat a certain number of dinners in the Inns of Court as a part of his training. This has a social as well as an intellectual value." [124]

CHARACTER AND THE APPLICANT FOR BAR ADMISSION,

By William M. James, Chairman Committee on Character and Fitness of the NCBE
Bar Examiner, September 1938 (p.121-126)

The article states as follows:

"In looking through the advance program published by the American Bar Association, I observed that I was described as "Chairman of the Committee on Character and Fitness. . . ." . . . These dignified references to my official position rather embarrass me because in Cook County I am known to the applicants for admission to the bar as **"Chairman of the Morals Gang."**

In Cook County, Illinois, we have a comparatively elaborate system for inquiring into the character and fitness of applicants for admission to the bar. . . .

. . .

In order to be admitted to the bar in Illinois, there are certain essential qualifications in addition to the educational requirements. The applicant must be a citizen of the United States, **he must speak the English language readily** and intelligently and he must satisfy the committee on character and fitness. . . .

. . . In this application he must state, among other things, his age and residence, the schools he attended, what degrees he received, whether or not he ever had any scholastic difficulties in school, whether he has ever been a party, either plaintiff or defendant . . ., **the names of his parents, their occupation and residence, if living, and so on."** [125]

CHARACTER AND FITNESS,

By Karl A. McCormick, Proctor of the Bar, Eighth Judicial District of New York
Bar Examiner, October-November 1938 (p.135-144)

This article addresses key issues pertaining to character review. It also makes a correct statement pertaining to probationary admission at the very end. The article reads in part as follows:

"Character fitness of applicants for admission to the bar seems to me to transcend any and all other necessary qualifications. . . .

. . . **Early in the history of our country, admission to the bar was open to almost everyone.** Very little education of any kind was required and the examinations, if any, consisted of a few oral questions propounded by the court. **In at least one state, by constitutional provision, anyone was entitled to practice law without meeting any test. And so, a belief became widespread that the "right" to be a lawyer was an American "right" and any limitation thereof was undemocratic and not in keeping with the traditions of our form of government.**

All of the advances that have been made, and I believe they have been many, especially in the past twenty years, have been in the face of **the old feeling that to preserve American ideals of democracy, the profession of law should be open to anyone who desires to enter.**

This feeling on the part of large numbers of the people has not been shared with other professions. Notably, the field of medicine has for many years been looked upon as properly restricted. . . .

But in our profession, we have many who relish the opportunity to argue loud and long that any system of limitation, even higher educational qualifications, may possibly deny society the benefit of the legal skill of a Lincoln or a Choate.

Doting fathers and mothers, . . . turn to law as the place where their children can perpetuate the family name, at a minimum expenditure of time and money.

. . .

After he has spend his time and money in his formal education and passed his bar examinations, the student is, for the first time, advised that there is a committee on character and fitness which he will have to appear before. . . .

This seems to some students like an unnecessary delay in their otherwise swift progress of admission to the bar. **Occasionally, some student or his parent or some close friend requests that this "formality" be waived** and the candidate be immediately admitted by the Appellate Division . . . . **One can hardly criticize such a request,** when we consider how perfunctory the method of character tests must appear to the students.

There, undoubtedly, was a time when a character committee made up of lawyers of long practice had an acquaintance with most of the applicants for admission. In those days, the numbers applying were comparatively few **and, in most cases, at least one member of the committee knew every candidate. . . .**

. . .

The State of Pennsylvania has been attempting to provide some kind of effective character tests since 1928. . . .

. . .

There are undoubtedly weaknesses in the Pennsylvania system and criticism has been heard of it. But after ten years of trial must it not be judged as infinitely better, . . . than any system now in vogue?

I think we can look to Pennsylvania for much assistance in bettering the system now in vogue in most other locations.

. . .

Plausible arguments can be made of cases of unfairness. Absolute impartiality is a rare quality in any human being, if in fact it can ever be found. . . .

. . .

I believe we should aim to bring about a closer contact between the admitting courts, the law schools, and the bar.

. . .

In connection with this subject, I desire to bring up the suggestion that has been made in recent years for a probationary period of admission. . . .

I do not see any merit in such a proposal. I do see great unfairness and unnecessary handicap.

. . . But suppose they were all serving a probationary period. How could they expect to obtain a clientele? What citizens would want to employ a young lawyer who was not fully admitted and might never be?" [126]

WOLFGAN KOHLER: Age, 26

Bar Examiner, December 1938 (p.146)

The following obituary was published in the December 1938 issue:

> "On the list of successful applicants on the September, 1937, bar examination in the record room of the State Bar there still remains one name opposite which no date of admission to practice is recorded. There the notation, "Died November 19, 1938," will be made and the list, complete at last, will be filed away.
>
> What of the story that lies behind those brief and prosaic entries? It begins a number of years ago in far-off Germany, where a school boy, as he toils at his studies, dreams of the day when he will take his place in the profession of the law in his native country. **Thoughts of the career of his father, a judge in Berlin, and of his grandfather, who had been one of Germany's greatest jurists, stood out like beacon lights . . . .**
>
> **While the boy was still in law school calamity struck. The door leading to the profession of the law was slammed shut in the faces of all Jews.** While there was a faint streak of Jewish blood in his family, the boy was not a Jew according to common understanding. It made no difference, under the regulations the door was barred to him and there was nothing that could be done about it. . . . The boy, undaunted, decided to emigrate to this country that free of the hatred and prejudices so rampant in his native land.
>
> . . . He passed the examination in the fall of 1937, but the fulfillment of his life-long hopes was not yet at hand. Citizenship was required to be admitted to practice as an attorney, . . . the requisite five-year period had not elapsed. . . . And then, just a few short days before that time arrived, "Wolfgang Kohler . . . died early yesterday morning. . . ." [127]

BAR EXAMINER, January 1939 (p.2)

The January issue of the new year reported that Wisconsin was increasing the amount of college education required from two to three years for admission and was **eliminating credit for courses "without intellectual content."** Facetiously, I would note that to comply with the rule the Bar would seemingly have to eliminate credit for courses related to law.

THE IMPORTANCE OF THE CHARACTER PROBLEM,

By Hon. Owen J. Roberts, Justice of the Supreme Court of the United States
Bar Examiner, January 1939 (p.3-5)

The most disturbing aspect of this article is that it was written by a Justice of the U.S. Supreme Court who really should have known better. The fact that he would present such views indicates how far up the problem extended and how expansive the NCBE's power was. Justice Roberts writes:

> "Now, the law schools have made a laudable effort to teach professional ethics and to instruct law students in the way a lawyer and a gentleman ought to behave. But that is the sort of thing that cannot be taught didactically. **That is the sort of thing a child absorbs in his family; that is the sort of thing a professional man absorbs in his professional family.**
> . . .
> The condition is particularly acute in the great cities. . . .
>
> They fall into bad ways. They have got to live. Heaven knows what you or I would have done if subjected to some of the stresses and temptations that these young people are subjected to in the great city bars today. . . .
>
> Now, in a bar of from three to twenty thousand people . . . how do you expect to have a condition such as in the English bar where the barristers are few in number, **known intimately to the judges,** to each other, where, if a man attempts to do what isn't done by most gentlemen, the community knows it in no time.
>
> **We have the same conditions in our country bars. You don't find in the country bars a man carrying on bad practices long. His judge knows, his county judge, his brethren know, the citizens in the community know. The thumb is turned down on him. He has got to get out of the communit**y. . . . Every bar in this country ought to put up character standards and enforce them strictly, look into a young man's past, a young woman's past, before he or she is permitted to become a student of law.
>
> Put your character standards as high as you can. My own state has done it, as you may know, and I think you do know it . . . . We have preceptorships in my state. . . .
>
> . . . You **cannot permit the metropolitan bars** to be crowded with thousands of lawyers beyond the needs of the community and then expect to discipline those lawyers for falling into bad ways. . . .
> . . .
> You have carried the flag forward on the intellectual side. The great problem of this Association, in my judgment, is to determine how the bar is to prevent overcrowding, the bringing to the bar of hundreds every year, of people who are doomed to disappointment and certain not to be needed . . . . the problem is how to put professional pride in one's achievement, in one's character, into our large, scattered, diverse bars **in the great centers of population** and to give the same kind of sturdy character . . . as we had a hundred years ago in the small community. . . ." [128]

BAR EXAMINER, MARCH 1939 (P.35-44)

In a series of articles, the March 1939 issue reexamines the Pennsylvania character investigation system. It should be recalled the Pennsylvania system applauded by the NCBE as a model to follow, formed the cornerstone for the NCBE's consolidation of power. The first article in this issue titled, "PENNSYLVANIA AN EXAMPLE OF SOUND CHARACTER INVESTIGATION TECHNIQUE" states as follows:

> "Pennsylvania has had an effective system of character examination for many years. Accounts of this system have been published from time to time in the Bar Examiner but, nevertheless, little is known outside of that state as to the actual workings of their system. Therefore the two articles on the subject which appear in this issue are of current value. One sets forth the actual machinery which is used throughout the state and the other gives information as to how it works in Philadelphia County." [129]

The most comprehensive analysis of the Pennsylvania system is in the article titled, "PRACTICAL OPERATION OF THE PENNSYLVANIA PLAN IN PHILADELPHIA COUNTY," by Albert L. Moise, Secretary of the County Board of Law Examiners of Philadelphia County. Moise writes as follows:

> "When the Supreme Court of Pennsylvania made sweeping changes in its rules affecting the registration of law students and admission to the bar examinations and to the Supreme Court, which changes became effective on January 1, 1928, naturally drastic changes were made in the work of the County Boards of Law Examiners. . . .
>
> . . .
>
> **In the case of an applicant who is the son or other close relative of a reputable member of the Philadelphia Bar and whose sponsors are known to the examining committee, not a great deal of examination is required. . . .**
>
> **The case of an applicant whose preceptor is not known to the examining committee and whose sponsors are also unknown, presents a more difficult problem. . . . Sometimes . . . adroit questioning gives a clue to . . . some incident revealing a lack of moral character. . . .**
>
> . . .
>
> **The Board is not now limited to rejections where it has something definite "pinned on" the applicant**. Since December 16, 1935, if a committee decides that an applicant does not possess the necessary fitness or general qualifications, other than scholastic, for registration as a law student, or for admission . . . the applicant may be rejected on that ground. . . .
>
> The State Board of Law Examiners has, in every instance, where unfitness and lack of general qualifications have been the grounds of rejection, upheld the County Board.
>
> . . .
>
> The number of rejections has become fewer, so also has the number of applications. Perhaps one reason for the fewer rejections is the fact that the work of the Board has become known and has had a deterring effect upon applicants who feel that their past conduct will not bear the close scrutiny of the Board.
>
> . . .
>
> In another case, while the application was before the examining committee, **an anonymous letter was received . . . stating that two of said applicant's brothers** had been in business

trading under their own first names; they decided to defraud their creditors and moved to another location; no creditors were paid and the new business operated under the name of the applicant for registration, under an arrangement whereby the creditors could not reach the assets of the new business because the two brothers appeared to be employed by the nominal owner, the applicant. . . . The information contained in the anonymous letter was checked and augmented by the efforts of a professional investigator and the examining committee . . . indicated that he was utterly reckless in the manner in which he permitted the use of his name and then ignored the fortunes of the business conducted under his name, and that this course of conduct disclosed a weakness of character and a general unfitness for the profession of law. . . .

Another case was that of an applicant . . . who first filed an application for registration as a law student in 1932. He was examined by two members of the Board and reluctantly approved. The application was not acted upon, however, at that time because the State Board informed the County Board that he had not completed payment of the registration fee. . . . **The committee questioned the applicant about his father's bankruptcy which occurred in 1932, and which, in the opinion of this committee, was highly questionable**. Neither of the examiners asked the applicant whether he had ever been arrested and he did not state that fact. **The professional investigator of the Board was asked to make an investigation with respect to the bankruptcy of the father of the applicant** to ascertain whether the applicant was implicated in it in any manner, and in the course . . . it developed that the applicant had been arrested. . . . The applicant's arrest was the result of a family fight, and the case against him was subsequently nolle prossed. The point in this case was that the applicant failed to state the matter . . . until . . . directly questioned about it. The examining committee was strongly of the opinion that the applicant had purposely suppressed the occurrence and that he was not frank with them. . . . The consensus of opinion of all of them was that the applicant was not frank, that he recollected facts in their most favorable light and that **his general background and personal impression were unfavorable.** It was impossible to pin the applicant down to any connected statement. . . . It was a particularly pathetic case because the applicant had an inordinate urge to become a lawyer . . . . he was rejected.

. . .

The other two rejections were applications for registration on College Entrance Board examinations. **One applicant was "obtuse" and his educational background and general qualifications were poor. . . . The other applicant . . . failed, by reason of his lack of intelligence, to convince the committee that the had the fitness and general qualifications other than scholastic to justify the Board in registering him.**

In addition to applicants actually rejected, the examining committee, in a number of instances, where it felt that the applicant, while apparently there was no reason to reject him, would never succeed as a lawyer but was better adapted for some other work, has discussed the matter with the applicant and persuaded him to withdraw his application. . . . The examining committee has also persuaded others whom it had decided to reject for sufficient reason, to withdraw their applications rather than to be formally rejected. In such cases, however, the committee usually files its report, so that should the applicant change his mind later, the committee's impressions and finding will be available to the Board. . . .

. . . The **examining committee in a great many instances has tactfully suggested to the applicant** that he obtain another preceptor where there is some definite reason to believe that the lawyer named as preceptor is not the type to successfully steer a law student into the way in which he should go.

. . .
After the State Board . . . has acted . . . the applicant then has the right to file a petition . . . for an oral hearing. If the State Board . . . affirms . . . the applicant may then appeal to the Supreme Court of Pennsylvania. Four such appeals were taken to the Supreme Court . . . between 1928 and 1935 and all four appeals were denied by said Court." [130]

BAR EXAMINER, APRIL 1939 (p. 57)

The April issue in a small section titled "Maryland is the Forty-First State" disclosed that Maryland had adopted the two-year college education requirement for admission to the bar, and that only a small group of jurisdictions now lacked such a requirement. Those states were pressured by the NCBE to adopt such a requirement in the portion of the article that read:

"Seven other states are still pictured in black on the legal education map." [131]

BAR EXAMINER, MAY 1939 (p.72)

The May issue reported that the Oklahoma legislature had repealed its' integrated bar act and provided for admission by those possessing a diploma as graduates of certain law schools. The legislature's decision which liberalized the ability to gain admission was characterized by the NCBE as follows:

"Such a situation clearly illustrates the vice of permitting admission standards to be fixed by legislative act. It is believed that the Supreme Court will use its inherent power to integrate the bar and to fix proper admission standards."

In another small section, titled "Higher Standards Recommended by Louisiana Bar Committee" the lack of stringent educational standards in Louisiana was characterized as follows (p.72):

"It should be a matter of concern, therefore, to all members of the legal profession in this state that Louisiana continues to be numbered among **the eight states classified in the most backward group** in the matter of general educational requirements." [132]

What the NCBE was apparently trying to do, was ostracize states that did not accede to their demand for restricting the legal profession. Their modus operandi had shifted from the early 1930s. Back then, attainment of their goals was predicated on convincing states to change. Now, they were trying to alienate states that did not submit to their will. Another small section titled, "A Comment on an Overcrowded Bar" (p.89-90) read as follows:

"The Bar is troubled with too many members and organizations of laymen are competing for the services to be rendered. Shall we reduce the number entering the profession? A quota system has its adherents but is not favored. It may be expected to discriminate unfairly. There are . . . more **subtle proposals** : (1) more efficient committees on character and fitness; (2) increase the duration of legal education; and **(3) make law schools the method of entrance to the Bar and then eliminate many of them by setting standards they could not meet. . . ."** [133]

The foregoing is an incredible statement that exposes the mindset of the ABA and NCBE power structure. Note most particularly that the reason for developing a restrictive admissions process is to solve the problem of:

"too many members . . . competing for the services"

and not for the ostensible, published justification of improving the quality of lawyers. Character review was designed to decrease the population of lawyers competing for business. Ultimately the author of this article rejected stringent character review conceding that:

> **"Furthermore, if character impressions become the effective test of admissions, they will not be applied with rigorous honesty."**

The author of this article supported proposal number (3) above which was predicated on eliminating certain law schools by setting standards they can not meet, under the belief that would result in:

> **"less lawyers in the large metropolitan centers** and a greater percentage of them in the smaller communities"

Each of the proposed options was designed to decrease the supply of lawyers for the purpose of increasing legal fees and was characterized, as a:

"subtle proposal."

Usage of the term "subtle" has an inherent diabolical aspect. It conveys an impression that "we'll say we're doing something for one reason, but we all know the real goal we are seeking to achieve."

THE BAR ASSOCIATION STANDARDS and PART-TIME LEGAL EDUCATION,

By Charles E. Dunbar, Jr. Chairman of the American Bar Association Section of Legal Education and Admissions to the Bar; Bar Examiner, January, 1940 (p.3-13)

The early 1940s reflected a growing severity in use of prejudicial language by the Bar Examiner. The magazine was supportive of Fascism, and accepted Nazi values. They also were trying to make the Bar paternalistic to the public, for the purpose of controlling the entire government. As will be demonstrated shortly, many of the articles are frightening, with an importance extending well beyond the admissions process. Chairman Dunbar of the ABA writes as follows in reference to the NCBE:

> "Our Section on Legal Education is justly proud of the fact that your organization, in a sense, is its child . . . . We have watched your progress and achievements **with paternal pride and gratification . . . .**
>
> . . . we are now carrying on **our struggle** in states and areas of our country where our program and objectives have been consistently opposed and are being bitterly fought. . . . To perform the task that remains ahead we therefore must have the active interest and support of the profession as a whole. . . .
>
> **. . .**
>
> The argument is also frequently made to us that it is highly desirable that the bar be recruited from the wage-earning class, as well as from the well-to-do and more privileged classes . . . . This argument must be considered by us and given proper weight, although we all know and recognize that there are great numbers of **so-called "poor boys"- of which class Mr. Justice W.O. Douglas of the Supreme Court may be cited as a shining example** -- who each year work their way through our full-time schools.
>
> **. . .**
>
> **We have been repeatedly warned . . . that any attempt on the part of the American Bar Association to excommunicate and eliminate part-time legal education would be an unfair attempt to eliminate about half of the students in our law schools at the present time**. . . . In fact, we have reason to believe and fear that if we should attempt to eliminate the part-time school, our action would result in arousing so much antagonism that our entire program and objectives would be seriously jeopardized and the work of your association . . . would be weakened and possibly destroyed.
>
> We must also bear in mind . . . that we have not yet sold our present minimum standards to the bar and the country as a whole. . . **. The Sheppard Bill, which has been adopted by the Senate . . . under the guise of preventing discrimination** against the graduates of unapproved schools in the securing of appointments to legal positions in the Government, in substance actually forbids consideration by the Government in connection with the making of Federal appointments of the kind . . . of legal training which an applicant has had . . . . If this bill is adopted -- and there is grave danger that it will be -- it will, in effect, be an announcement by the Congress of the United States that educational qualifications and requirements should not and will not be considered in connection with the selection . . . of lawyers in the various departments of the United States Government. The adoption of the bill will amount to the repudiation by the Federal Government of the policy and laws of forty-one states of the Union. . . . Such a **declaration of policy by the United States Government will also amount to a repudiation of the activities and achievements of the American Bar Association** . . . .
>
> **. . .**

> . . . **No one has a right to admission to the bar, whether he is poor or rich.** The only right which exists is the right of the public to be protected against incompetent lawyers.
>
> Primarily . . . in fixing minimum standards of legal education and admission to the bar, we must consider not whether some deserving boy has found it difficult . . . but rather whether the public will be better served. . . .
> **. . .**
> **. . . We are doing just what the American Medical Association has done before us.** There are only six unapproved medical schools in the United States. . . .
> **. . .**
> . . . **We must not forget that in many parts of the country there still prevails the fallacious and discredited idea that everyone in democratic America has a right to become a lawyer, and that any restrictions or limitations on this right are un-American and undemocratic."**[134]

Read the last paragraph again. It's worth repeating:

> "We must not forget that in many parts of the country there still prevails the fallacious and discredited idea that everyone in democratic America has a right to become a lawyer, and that any restrictions or limitations on this right are un-American and undemocratic."

THE FIRST THOUSAND!

By Marjorie Merritt, Assistant Secretary of The National Conference of Bar Examiners
Bar Examiner, January 1940 (p.14-24)

The results of the first thousand centralized character investigations by the NCBE are examined in this article. A table broken down by State details the number of investigations made. A small footnote with respect to California states:

> "The tabulation shows that California, the pioneer subscriber to the service, furnished one-fourth of the total number of applications. She has employed this method since it first became available **as an aid to "rid the temples of justice of termites".** . . ."

The article goes on to state:

> "It is to be noted that **some of the states are troubled with "back-door" applicants**, as those are called who leave a state because they cannot meet its requirements . . . , go elsewhere and gain admission, and then after a few years return to the original state in an effort to be admitted on the basis of a period of previous practice. Missouri, for example, receives for possible acceptance some of its raw material which for a time is side-tracked in Arkansas. . . . Connecticut has an interesting provision . . . her back door is of solid oak, with a Yale lock!
> **. . .**
> . . . Some boards and committees are stricter than others or consider more seriously certain defects in character. **For example, one board may wish all possible details as to domestic difficulties, while another feels them of no importance . . . . A differentiation is sometimes made between personal character and professional character ; in other instances all attributes are considered entirely as a whole. . . .**
>
> The statistics sow that 104, or 10.4 percent of the 1000 applicants were not admitted to the bar either because they were denied a license or because they withdrew. . . . **This means that approximately one out of every twelve is a black sheep, or at least a spotted one. . . .**
> **. . .**
> In this type of work the investigator sometimes wonders, and asks, "what to look for." The Conference looks for almost anything -- expects, and gets it. The facts cover a wide range of situations and the goods are of many patterns. **Among the applicants have been . . . drunkards, gigolos, painters, paranoiacs, preachers, rapists, realtors, tree-choppers and wife-deserters -- all considering themselves "good lawyers.**
> **. . .**
> . . . Mr. M, a lawyer of ten years' standing and a former prosecuting attorney, who proved to be an exhibitionist; Mr. R, **who tried to have his marriage annuled . . . , Mr. N, with a good record for twenty-three years, who absconded with a fellow attorney's wife** . . . .
> **. . .**
> The preceding examples show clearly the great variety of circumstances bearing on character and fitness **which make impractical any general "rules of procedure**." . . . ." [135]

BAR EXAMINATION RESULTS TO BE CONSIDERED IN APPROVING LAW SCHOOLS,

Bar Examiner, April 1940 (p.27-28)

In a small section titled as above, it was disclosed that the ABA Council on Legal Education would take into consideration the percentage of applicants who passed the Bar exam from a particular law school in deciding whether to accredit the school. To facilitate the resolution, state boards of law examiners were requested to furnish the ABA with Bar examination results of all applicants. [136]

SOME PROBLEMS OF ADMISSION TO THE BAR THAT AFFECT THE LAW SCHOOLS,

By Marion Kirkwood, Dean Stanford University Law School
Bar Examiner, April 1940 (p.28-33)

Three interesting quotes appear in this article which addresses using the State Bar gimmick of using quotas to limit attorneys. They are as follows:

> "The only justification for a quota, so defined, is to prevent overcrowding in the Bar and the evils in the administration of justice that are assumed to result therefrom."
>
> "**Character study is very fruitful in dealing with older applicants** who have had worldly experience. . . . But with the much larger mass of young people fresh from college and law school we do not get very significant results from such a test."
>
> **"Under such a situation the quota will not help solve the problem of overcrowding. Its chief effect will be to enable those who are admitted to exploit those who are not.** Also the presence of many applicants may readily aggravate the unlawful practice problem. Is it not likely that many of these young people will seek positions in banks, real estate offices, etc., and employ their legal training in a manner that will grieve the Bar." [137]

HOW TO BE A SUCCESSFUL LAWYER,

Bar Examiner, October 1940 (p.89)

A small section titled as above examines a California State Bar questionnaire sent to attorneys. One question read as follows:

"What methods and activities have you employed to secure and build up legal practice ?"

One submitted answer read as follows:

> "To become a successful practitioner of the law in a rural community, especially where he is a stranger, a young lawyer should, like Jacob, wear a coat of many colors, be a social lion, a political zebra, a smooth talker, a fast worker, a personality boy. He should at least be a director in one bank, preferably the president of the other one; a member of the chamber of commerce, a director in the junior chamber of commerce, an active member of the Kiwanis Club, Elks Club, Masonic Lodge, Redmen, Eagles, 20-30 Club, Lions Club, and any others. In all of these he must be known as a Jolly Good Fellow . . . . He must be able to shake hands until his elbow smokes. He must be a pillar of the biggest and richest church in town, and must be a favorite speaker for the Women's Home Improvement Club . . . and he must be able to drink all the other Eagles or Elks under the table. . . ." [138]

AGE GROUPS OF MIGRANT ATTORNEYS,

Bar Examiner, January 1941 (p.12)

The Bar Examiner revealed in the above titled section, statistics related to the age groups of "migrant attorneys" (attorneys licensed in one state seeking licensure in another). Approximately 50% were between the ages of 30 and 40. The issue from the Bar's viewpoint was that the ability of an attorney licensed in one state to gain licensure in another, had the effect of diminishing the ability of the Bar in the original state of licensure from exercising control over that attorney. If attorneys could pick up and move to other states easily, they would be more inclined to challenge State Bar ideology. Conversely, if the ability to obtain multi-state licensure was diminished, the originating state of licensure maintained leverage over an attorney, since they were the sole controlling source over that attorney's ability to earn a living. [139]

BAR EXAMINER, January and April 1941

By 1941, over 40 states had adopted the two-year college requirement for licensure. The NCBE naturally therefore now wanted a four-year requirement. They enjoyed some initial success in their quest, but when World War II began it would eliminate their initial success. The War placed in jeopardy everything they accomplished during the 1930s. 1940 would be the last year of their pinnacle of power, until well after the War. During the War, there was an immense liberalization of admission requirements. This angered the ABA, State Bars and NCBE immensely. State Bar rhetoric was at it's height of doing violence to intellectual rationality and extended well beyond racial prejudice. Substantial language in NCBE articles suggests the controlling forces of the American legal profession did not support the U.S. fighting against Germany, at least to the extent such sacrificed economic interests of the legal profession. The January 1941 issue disclosed that Harvard University was requiring a seven-year program for graduation from law school, comprised of four years of undergraduate and three years of law school study. The NCBE was ecstatic, but the rug would be pulled out from under them quickly.

The April, 1941 issue, disclosed a policy pertaining to the national draft that affected the legal profession. Lewis Hershey, Deputy Director of the Selective Service System issued Memorandum I-12. It allowed local draft boards to grant deferments to individuals who had completed law school, but not yet taken their examination for admission to the Bar.

THE LAW SCHOOLS AND THE SELECTIVE SERVICE ACT,

Bar Examiner, July, 1941 (p.51-64)

The ABA and NCBE viewed World War II predominantly from the perspective of how it impacted the legal profession and their quest to seize power, rather than how it affected our nation as a whole. This article contains significant language challenging whether Bar Applicants should be subject to draft requirements like other citizens. It exemplifies an overall negative attitude by the NCBE towards draft boards. Note in the first section how the NCBE places in quotation marks the phrase, "to meet the emergency" as if to sarcastically and falsely suggest there was no national emergency. The article states:

> "It is too soon, of course, to reach any conclusions as to what effect the national defense program, and the Selective Service Act in particular, will have on the future of the legal profession. Much concern, however, has been evidenced on the part of law schools and those interested in maintaining high educational standards for admission to the bar, less the profession suffer permanently as a result of a decrease in law school enrollment, interruptions in the law school course, **and ill-advised concessions "to meet the emergency**."
>
> **. . . there is usually a "back door" for the individual who does not meet the exact requirements, left open for the occasional case, the so-called "Abraham Lincoln." . . . .**
>
> It seems not unlikely, therefore, that the Selective Service Act will have the effect of interrupting the flow of well prepared men who apply for admission, while the supply of men with less adequate training will be greatly augmented. . . .

. . . If the conditions of present day life are more complicated and difficult than those of a previous generation, then the bar and the public will suffer grievously by the interruption of the supply of the better trained men and the increase in the number of those who can only get the minimum . . . . **The bar examiners must set up their own defense program** if they believe that adequate law training is in the interest of the profession and in the public interest.

. . .

Unless readjustments are made in its operation, the Selective Service Act will doubtless make serious inroads on law school attendances beginning next year. Law students are just ripe for picking under the Act. . . .

The memoranda from the National Headquarters of the Selective Service System do not preclude the deferment of law students to enable them to complete the law course and take the bar examination, but their wording does not lend encouragement to such deferments. I believe that the law schools should give their students every assistance in securing the II-A Classification. . . . The operation of the draft must be viewed in perspective, not with only one year in mind. Law and its administration are the indispensables of government. . . .

. . .

. . . First and second year students are asking for a II-A Classification. . . .

. . . I cherish the hope that, if a student is well along in a semester's work when he is on the list to be called, he will be able to secure a postponement until he can complete his semester's work. The draft board could exercise such a discretion.

. . .

There is no likelihood of voluntary enlistments affecting enrollment. An arbitrary attitude on the part of local boards and the noticeable impoliteness of their employees have engendered a general hostility which encourages avoidance of the obligations imposed by the Act. . . .

. . .

. . . The lawyer bears a similar relation to the experts in the various social disciplines. Properly conceived, law is an applied social discipline. It is the lawyer's responsibility, through the creative forces of law, to shape and give vitality to the social pattern. It is the responsibility of the schools to educate social engineers." [140]

THE LAW SCHOOLS AND THE EMERGENCY,

By Albert J. Harno,
Bar Examiner, October 1941 (p.75-83)

At the time this article was published, Pearl Harbor and the entry of the United States into World War II was approximately two months away. In guaging the extent to which the legal profession had an interest in dominating government, consider the following passages:

> " What is more, it is needful, yes, imperative, in the interests of human welfare, that we contemplate a program which looks beyond the perils of war and to the perils of peace. Competent leaders are essential in time of war; they will be equally essential when we face the problems of peace. We should consider whether we are gearing our national economy on the basis of an emergency for defense and perhaps war without adequate consideration for the emergencies of peace that lie ahead. . . .
>
> . . . **The profession's pre-eminence in supplying leaders** for the principal offices of government is well known. But this is only part of the story. Public opinion and policies are not shaped alone in the halls of Congress and in the offices of our executives. They take form and find expression in the hundreds of communities. . . . And here, as democracy in all of its intricacies goes into action, **the lawyer, often unnoticed and unsung, does some of his most effective work. I do not, of course, claim that his voice always prevails, but I do say that, throughout the length and breadth of the land, it is the dominant one.**
>
> It is the significance of the relation of the lawyer to the wholesome operations of democracy that discerning leaders of the bar have noted, and it is this, among other things, that has inspired them to labor unceasingly for improved standards of legal education and a better bar. If the lawyer, trained as he has been, was so vital a cog in the vast machinery of democracy, then potentially he has a mission for even greater usefulness. . . . **The lawyer, as I have said, by virtue of the place he occupies in the social matrix and through the materials with which he works, the law, is the country's social engineer**. . . . **The public has never been fully informed on the import of the place the lawyer occupies in the affairs of democracy. Lawyers themselves have been so immersed with the routine duties of their profession that, except for a far-sighted few, they have not been fully conscious of their strategic position**. . . . **The time has come, as one of my fellow-workers has well expressed it, when "in order to save ourselves, we shall have to reveal ourselves."**
>
> **. . . The immediate difficulties for legal education are precipitated by a national policy enacted** into a law **through a Selective Service Act which fails** in its terms and in the interpretation of its terms to recognize that legal training is essential to the advancement of the public welfare in the national emergency. . . . **It seems fitting, however, at this time, indeed it is our obligation, to inquire into the wisdom of that policy**. . . . We rest our case on the premise that this course . . . if continued, will tend to destroy a fertile source from which the country, in the past, has drawn its leaders both for military service and form many services, great and small, arising from and demanded by the affairs of ongoing democracy. . . ." [141]

Note the two phrases above most particularly:

> "The **public has never been fully informed** on the import of the place the lawyer occupies in the affairs of democracy."
>
> and
>
> **"in order to save ourselves, we shall have to reveal ourselves."**

STATISTICALLY SPEAKING,

By James E. Brenner and Leon E. Warmke, California Committee of Bar Examiners,
Bar Examiner, January 1942 (p.8-13)

In this article, the authors reveal that the California Committee of Bar Examiners since 1932 was secretly maintaining history cards for each Applicant, showing in detail all pertinent facts relevant to their admission. It then conducted a study correlating disciplinary proceedings to the record of the Applicant prior to admission. The article analyzes the results as follows:

> "This disproportion between the subjects of discipline among those without and among those with at least two years of college training becomes even more striking in light of the fact that, considering all applicants since the beginning of 1932 . . . the number of those who had at least two years of pre-legal college training is almost eight times as great as the number of those without . . . .
> . . .
> It is further of interest to note that of the total number of men disciplined as above noted, five were "repeaters" on the bar examination, having failed one or more previous examinations prior to their ultimate success . . . .
>
> **This unusual correlation of the subjects of discipline with the type of pre-legal and legal education of the attorneys involved would seem to indicate either or both of two things :**
>
> > **(a) That, speaking generally, a man who has not engaged in an ABA approved method of pre-legal and legal education is less likely to have acquired as high a standard of ethics as one who has . . . .**
> >
> > **(b) That, again speaking generally, those attorneys who are admitted without having engaged in an ABA approved method of pre-legal and legal education may not possess sufficient legal equipment with which to compete in active practice . . . ."** [142]

The article **fails to disclose** a possibility not incorporated into (a) or (b) above that could explain the strong correlation between imposition of disciplinary action and lack of a two-year college education. That possibility and reasons supporting its existence are stated by this author as follows:

> **"The California Bar has <u>motive</u> to further its' policy of requiring a two year college education, since that policy results in decreasing the number of attorneys in the state. It**

has opportunity to further that policy through strategic imposition of discipline to promote their own self-interest. The disciplinary committee can subject licensed attorneys who lack a two-year college education to a more stringent disciplinary process, than those who possess the two-year college education. In doing so, the value of the two-year college education requirement as a means of avoiding Bar discipline can be emphasized. **The disproportionate correlation in such an instance must be viewed as one intentionally created by the Bar to further its own self-interest, rather than any type of connotation pertaining to the ethics of the individuals disciplined**. If such is the case, then the correlation must further inescapably be viewed as reflecting negatively upon the character and ethics of the California Bar's disciplinary committee."

WATCH THE BACK DOOR!

Bar Examiner, January 1942 (p.14-15)

Since the early 1930s the NCBE was concerned with what they called the "Back Door" Applicant. The Applicant who somehow always seemed to gain admission by carefully reading the rules and finding the loopholes therein. The Applicant who applied to states with less stringent admission requirements, and therefore represented an economic threat to states with more restrictive requirements. In this small section titled as above, the Bar Examiner publishes portions of the New York case, *In Re Lefkowits*, 285 N.Y.S. 249 (1936) which deals with the "Back Door" Applicant issue. The opinion is interesting because of its' publication of facts that were not even appropriate for consideration by the Court. They deal with personal matters not relevant to admission, and falsely determined by the Court to be relevant. It states as follows in reference to the applicant:

". . . **His early education was obtained in the public schools**, and for about three years in three different high schools in the city of New York, and several months in a private preparatory school. . . . In June, 1929, after one law school year, applicant was admitted to the bar of Indiana after examination by a local committee. . . . He actually practiced for five years in Indiana, which would bring him to June 26, 1934. He returned to this state on July 15, 1934. **He lived in Brooklyn with a stranger, although his parents lived in Manhattan. The reason given is that his parents did not have room for him. . . . the record fully justifies the inference that the applicant undertook by a circuitous and indirect route to do that which he was not qualified or unwilling to do directly. . . . Application denied."** [143]

EMERGENCY ORDERS AND CHANGES IN RULES GOVERNING ADMISSION TO THE BAR,

By John Kirkland Clark, Chairman, The National Conference of Bar Examiners (April, 1942)

This article is incredible. Written by John Kirkland Clark, Chairman of the NCBE it reveals a great deal about the organization. There is no doubt in my mind that Clark was a Nazi. His comments in various articles herein have already been discussed and reveal the despicable nature of the NCBE. This article is no exception. He irrefutably does not approve of the leadership of the allied countries and his comments convey substantial sentiment in favor of Nazi Germany. Before addressing his comments, I ask the reader to consider his comments in another article. In fact, this quote is perhaps the most important one in this book and conclusively resolves any debate regarding what the NCBE is about. The reader is encouraged to verify the legitimacy of this quote by referencing the actual Bar Examiner issue. He writes as follows in an article addressing overcrowding in the Bar, published in the Bar Examiner, October 1943:

> **"Our European brothers went further. Der Fuehrer, in 1935, issued a decree that, for a period of years, no more lawyers should be admitted to practice."** [144]
>
> **ADDRESS by the CHAIRMAN,** John Kirkland Clark
> Bar Examiner, October 1943 (p.61-63)

As far as I am concerned, that is the whole ball game. The NCBE chairman in 1943 referred to "Der Fuehrer," as "Our European brothers."

In this article dealing with emergency orders pertaining to Bar admission, and published in April, 1942 Clark's comments are as follows:

> "All too few of our citizens . . . have any comprehension or realization of the importance of preserving **our cultural educational system** and the continuous training of future lawyers **who . . . will be called upon to handle and solve the outstanding problems of the re-adjustment of the world**. Few appreciate the frightful results, especially in England and in France, not to mention Germany, of the slaughter of those who should have become the leaders of public opinion in those countries in the last decade. No one can say, today, whether, if a core of educated and trained youth had been kept out of the front-line service in the years between 1914 and 1918, there might not have been leaders with enough keenness of perception and force in the direction of the governments of England and France to have coped with the situation which the elderly statesmen of the day failed to handle properly." [145]

Note his use of the adjective "cultural" to preface "educational system." Note his phrase "re-adjustment" of the world. Following Clark's address in a section titled, "Summary of Emergency Rules and Orders Regulating Admission to the Bar" a compendium of each state's provisions for admission during the war is included. The NCBE was losing power during this period. Admission rules were being liberalized. Some of the more interesting provisions included the following:

ILLINOIS - The final semester of law school study may be waived for applicants about to enter the armed forces. Applicants who fail to pass the bar examination and who enter the armed forces may be re-examined only in subjects which they failed.

IOWA - Any applicant in the armed forces who is prevented from taking the June 1942 bar examination will be admitted without examination upon showing degree from an approved law school.

KANSAS - Any student who could complete the regular law course by September 1, 1942, but prior to that date is called into the armed forces may petition the court for admission and it may grant him admission.

MASSACHUSETTS - Students in the last year of law classes will be eligible to take the bar examination

NEBRASKA - Any applicant prevented from taking regular June, 1942 bar examination by reason of being in the armed forces shall be admitted without examination provided he has received a degree from an approved law school

NEW YORK - A law school may, in its discretion, waive attendance upon lectures and recitations during the remainder of a semester or session and grant full credit therefor, without examination

PENNSYLVANIA - A registered law student who has failed bar examination and is prevented from appearing for further examination by reason of induction into armed forces will receive certificate of the Board recommending his admission

TWO NEW RESOLUTIONS ON STANDARDS,

Bar Examiner, July 1942 (p.55-56)

In this article, the NCBE published that due to the war, the ABA had relaxed standards pertaining to the number of credit hours required in law school during a semester. The provision itself is not particularly noteworthy. However, the use of <u>one term</u> in the Resolution is of monumental importance. The pertinent language of the resolution of the Association of American Law Schools states as follows:

> "NOW THEREFORE BE IT RESOLVED that effective with the summer session of 1942 and during the continuance of the present war any student . . . **who enters the armed forces of the United States or of any co-belligerent . . . ."**

The term used is:

"co-belligerent."

I always think of the United States, France and England as being the Allied forces. Most Americans do. The ABA apparently viewed them as the "co-belligerents." The term "belligerent" is defined in Webster's II New Riverside Dictionary as follows:

Belligerent - Inclined to be aggressive or hostile

By using the phrase, "co-belligerent" the supporters of the ABA Resolution were communicating that they viewed the Allied Forces as the aggressive or hostile side in World War II, rather than Nazi Germany. An accompanying Resolution of the ABA Section of Legal Education then states as follows:

> "RESOLVED that during the continuance of the present war any student . . . called for service under the Selective Service Act or who enters the armed forces of **the United States or of any co-belligerent**. . . ." [146]

NEW YORK JOINT CONFERENCE ON LEGAL EDUCATION URGES MAINTENANCE OF STANDARDS

Bar Examiner, July 1942

This article examines the utility of emergency orders issued during World War II to liberalize Bar admissions. It adopts the irrational position that notwithstanding the War, admission requirements should remain restrictive. A portion of this short article that defies rationality states:

> ". . . For young men still in law school when called into service, there is a natural desire on the part of the schools and the bar admission authorities to make easier their graduation and their admission to the bar, even at the cost of relaxation of standards achieved **after a long struggle.**
>
> **Whether such concessions shall be made to these men must, however, be determined in the light** of the public interest and **of the benefit to the men themselves in the long run**. These considerations, we believe, call for substantial adherence to the standards . . . found advisable in peacetime." [147]

The operative phrase reads, "the benefit to the men themselves." It was irrational for the New York Conference to assert that an individual fighting for his country in a war, would not benefit from less restrictive admission requirements. Use of the conjunction with the accompanying phrase "in the light of the public interest" must be viewed as disingenuous. The NCBE was obviously panicking at their loss of power and influence.

BAR EXAMINATIONS MILITAIRE,

Emergency Systems of California and Illinois,
Bar Examiner, July 1942

This article disclosed war time provisions adopted by the California Committee of Bar Examiners. The provisions provided that Applicants in the armed forces could take the bar examination where they were stationed under the direction of their commanding officer subject to the following requisites, which are interesting:

> ". . . the examination in six sealed unit packages . . . appropriately marked and labeled, shall be sent to the commanding officer of the applicant, and shall be opened only at the times specified thereon."
>
> "The examination shall be administered by the commanding officer, or, under the direction of such officer, ..."
>
> **"If the applicant is called upon by the commanding officer to perform emergency duties arising from the war situation, as soon after the termination of the emergency duties as the commanding officer deems proper, the applicant shall résumé the taking of the examination, and the time during which he was so occupied with such emergency duties . . . shall be added to the time remaining. . . ."** [148]

NEBRASKA SUPREME COURT UPHOLDS INHERENT POWER TO PRESCRIBE BAR ADMISSIONS REQUIREMENTS,

Bar Examiner, July 1942 (p.69-71)

The power of the Judiciary rather than the Legislature to prescribe admission requirements, so often falsely touted as resting irrefutably in the Judiciary, was again refuted in the Nebraska case, *State ex rel. Ralston v. Turner*, 4. N.W.2d 302 (1942). The facts were as follows. The 1941 Nebraska legislature passed an act providing that graduates of resident law schools who passed the Bar exam shall be admitted to the practice of law. A student who passed the exam was denied admission and brought an action for a writ of mandamus to compel acceptance of his application. The Court in furtherance of its own self-interest, unsurprisingly, denied the Petition. The Court's Syllabus published by the Bar Examiner states as follows:

"1. The character of police regulation, whether reasonable, impartial and consistent with the Constitution and the state policy, is a question for the court.

2. When the legislature passes an act which plainly transcends the police power of the state, it is the duty of the judiciary to pronounce its invalidity.

. . .

5. The term "inherent power of the judiciary" means that power which is essential to the existence, dignity and functions of the court from the very fact that it is a court.

6. The supreme court is vested with the sole power to admit persons to the practice of law . . . and to fix the qualifications for admission to the bar.

. . .

14. Where a legislative bill constitutes an endeavor on the part of the legislature to go beyond the concept of minimum requirements of an applicant to take examination for admission to the bar and denies the judicial department the power to place higher qualifications than those specified in the act, and, in fact, usurps the power of the judiciary in such respect; held, such legislative act is unconstitutional.

15. Even if the subject of the legislation was a proper exercise of legislative power, the legislative bill in the instant case is unconstitutional and void in that it definitely freezes the class." [149]

THE ANNUAL MEETING,

Bar Examiner, October 1943 (p.50)

The October issue opens with a summary of the thirteenth annual meeting of the NCBE held on August 24 in Chicago and states as follows:

> ". . . In the address by the Chairman, which is published in this issue, Mr. John Kirkland Clark of New York stressed **the urgent need** for the continued training of liberally educated **lawyers who will serve as leaders in preserving the peace for which our country is now fighting**. . . .
>
> General discussion indicated clearly **grave concern** over the future of the law schools and the very future of the legal profession itself. In his address at the afternoon session, Dean Albert J. Harno, Chairman of the Section of Legal Education, **expressed the sentiment forcefully** when he said : "These are dark days for the schools -- days in which the values we prized in normal times may easily lose their significance. . . . I have wondered sometimes whether through the years some of those criteria have not become stereotyped and barren. . . . Their substance was real before the war, and it is no less real now. It would follow, then, if it was indefensible to send a poorly qualified lawyer into society before the war, it likewise is indefensible now. This is the issue on which we must stand firm." [150]

STANDARDS OF ADMISSION TO THE BAR : CAN THEY BE MAINTAINED ?

By Herbert W. Clark, Former Chairman, California Committee of Bar Examiners
Bar Examiner, October 1943 (p.51-61)

By 1940 the NCBE's centralized character review program had made the organization self-sustaining at the expense of Applicants. The two-year college education requirement was adopted by over 40 states. Some states had enacted a system of law student registration with accompanying character review and others were moving towards it. Those states that were not moving towards adoption of NCBE quasi-mandates found themselves ostracized by the ABA and NCBE. There was substantial discussion about implementing quota systems to limit the number of lawyers. The ABA and NCBE were moving aggressively towards adoption of a four year college requirement to further restrict admissions.

The legal profession seemed to be in total control of its destiny, without regard to the detriment inflicted upon the public. The public interest was nevertheless consistently emphasized for propaganda purposes as the justification for admission restrictions. There was extensive discussion about the importance of lawyers, not simply regarding their role in litigation, but also regarding their role as government leaders. The ABA and NCBE was poised to move from regulating the profession, to assuming control of the government.

And then everything changed. World War II began. State after state relaxed admission requirements by implementing emergency orders with respect to education, examination requirements, and even waiver of the exam in certain instances. The Selective Service System (the Draft) was demolishing the NCBE's program. Increased conflict between the NCBE and the Selective Service System gave the impression that the NCBE did not support our nation's role in World War II. The allies were referred to by the NCBE using the phrase, "co-belligerent." The NCBE Chairman, John Kirkland Clark made numerous statements suggesting he was a Nazi. If 1940 was the height of the NCBE's power, 1943 a short three years later was its bottom. A year of complete desperation and with such came the consequent irrational emotion of bitterness. The articles in the 1943 issues exhibit such, often using imprudent language destined to come back and haunt the NCBE's legitimacy. They were too blatant. They violated the most basic predicate which had furthered their rise to power. They failed to use wise publicity.

The NCBE decreased its' ostensible emphasis on the public interest. Instead, it openly promoted self-serving interests of the profession in what appeared to be a mad, desperate attempt to save the power they had seized during the 1930s. They appeared willing to go to virtually any lengths to do so.

This article written by Herbert Clark addresses the impact of the war on the legal profession. It is not quite as vitriolic as the next article by John Kirkland Clark, Chairman of the NCBE, but does make disturbing statements. He writes:

> "Notwithstanding **several signs of repentance that have become visible since December, 1941**, it is fair to ask the question, "Can the Standards of Admission to the Bar Be Maintained ? Upon the record, in view of what has happened, and after some reflection, my regretful answer is, Probably not. And now, assuming myself to be under cross-examination, I shall proceed to explain and qualify my answer.
>
> . . . In 1892 the American Bar Association adopted a resolution recommending that the power of admission to the bar in each state should be lodged in the highest courts of the state. . . .
> **. . .**
> In 1897 the American Bar Association declared in favor of a three-year law course and at least a high school education. . . . In 1916 the Standard Rules for Admission to the Bar were adopted,

and in 1918 the American Bar Association approved the minimum requirement of two years of college.

In 1921 a most vital step was taken. Under the chairmanship of Elihu Root comprehensive standards of admission to the bar were presented and approved by the Section and by the American Bar Association.

. . .

. . . it may be safely said that prior to December 7, 1941, the whole trend of education for the law was in the direction of . . . longer legal education.

. . .

The trend toward better and higher standards of admission was so clearly discernible that on August 25, 1936, the Chairman of the Section on Legal Education, thinking that perhaps that he had heard "the murmur of the world" was prompted to state --

". . . This year and last, state after state has tumbled into column."

. . .

Six years ago at Kansas City, the same Chairman of the same Section . . . told his hearers that, :

> ". . . I have no fear of the outcome. **The day has come when the states . . . which do not conform will be almost forced to conform** . . . . **The consequence is that that particular battle is to a large degree from my point of view, won, although the flags are not yet hoisted."**

. . .

What did happen . . .? The story is interesting . . . because it shows what is likely to happen even to the most sincere men when, taken by surprise, they are subjected to material pressure, appeals to patriotism . . . .

Well, the Association of American Law Schools held a meeting at Chicago on December 29-30, 1941, twenty-two days after Pearl Harbor. . . . The proceedings of that meeting . . . make most interesting, if somewhat irritating, reading. The substance of the question under discussion was whether or not and to what extent departure during the emergency created by the war should be permitted from the standards of the American Law School Association. . . .

. . .

At Detroit on August 25, 1942, the same Chairman of the Section of legal Education in his opening remarks to the joint conference of the National Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar had this to say about what happened at the meeting of the American Law School Association in December, 1941 :

> "The Association . . . voted what we considered to be a very drastic relaxation of standards. . . ."

He did not attempt to soften the blow by telling that at the meeting in December, 1941, there were a few who stood openly and avowedly for the maintenance of standards. . . .

. . .

. . . what was the effect of that almost miraculously quick December somersault coupled with the emotionalism of the moment. Well, almost immediately in at least one Pacific Coast State the Bar Examiners were subjected to pressure by some schools to follow the lead. . . .

. . .

The dean of another school whose merit is nationally recognized, had this to say:

> ". . . we are interested not only in winning the war but winning the peace. That is where the bar comes in. **The bar is, as has been said, going to have greater responsibilities than it has had since revolutionary times in guiding the destiny of the country. . . ."**

And then taking up specifically the question of the effect upon standards of streamlining the law course, the same dean said:

> **". . . This thing of getting standards of admission to the bar has taken years of often vicious fighting.** If you cut them down now it might take years and years to restore what has taken years of effort to build up. . . ."

. . .

But what was happening elsewhere was too strong to resist and the next step was that most of the California schools announced their intention to streamline the traditional three-year course. . . . the Legislature gave way and amended the statute. . . .

The California experience is not unique. . . . The law schools weren't satisfied to make some concessions. . . . They went the whole distance. . . .

. . .

Having for a period of years and through a **long and bitter struggle** adhered to the now traditional three-year-twenty-seven-month law course, with an appreciable tendency toward a four-year-thirty-six-month course, are the law schools of the country now going to tell the public that the schools were on a branch track all the time until the war compelled them to get on the main track by streamlining the accepted traditional law course. . . . And what about the fourth year we formerly heard so much about ? To the innocent bystander it would seem that either the law schools were wrong prior to December, 1941 or that they have certainly been wrong since that date. . . .

. . .

Unless the law teachers can demonstrate that they were wrong prior to December 7, 1941, it seems to follow fairly clearly that they are wrong now. If they are wrong now, it can hardly be expected that the errors committed will continue during the war only. . . .

. . .

. . . Some law teachers have already become a trifle moody about the position legal education is in and they are inclined to be just a bit irritable when discussing the situation. . . ." [151]

ADDRESS BY THE CHAIRMAN,

John Kirkland Clark, Chairman NCBE, Bar Examiner October, 1943

This is the most irrational article I have read in the Bar Examiner. Several pages back I referred to it. Clark envisions a post-war world order controlled by lawyers. I now quote his writing at length:

". . . what good is it to win the war if we should again lose the peace and chance for the creation of a world of law and order and the abolition of future wars ? . . . **Lawyers, because of their training and their liberal education, are the natural leaders in a post-war world.**

As Patrick Henry sagely remarked, " I know no way of judging the future but by the past," and when we consider the past of event years ago, we realize how fully liberated educated men are needed in this present crisis. . . .

Ten years ago, we began, here, to be disturbed over the alleged "overcrowding of the bar." . . . Yet, during the discussions of that period, the Dean of the Law School which is our host today suggested the desirability of an ordered economy in the limiting of law school students.

Our European brothers went further. Der Fuehrer, in 1935, issued a decree that, for a period of years, no more lawyers should be admitted to practice. We scoffed at it, thinking that such arbitrary action was ridiculous, absurd, that no man had the right or the power to make such an order. We never dreamed what an extra territorial effect Herr Hitler's power gave him. Yet now, less than ten years after his decree, Adolph Hitler has decimated the number of our law students and has practically suspended the process of liberal education among our young men!

. . .

Yet we must--and we shall--face these problems and solve them. **Otherwise the world will "go to smash." No greater crisis has ever confronted the world. No greater need has ever demanded the service of our ablest minds. To solve these problems, we must intensify our study of history, philosophy, government, international relations, human relations in general, economics, taxation,--to mention the major fields.**

What, you may ask, has all this to do with legal education and bar examinations? Much more than is noticed on the surface. **Throughout our history lawyers, as liberally educated men, have led our nation,-- from the colonial days, the Declaration of Independence and the adoption of our Constitution**. **In making the new world which will arise, Phoenix-like, after this global conflagaration, there must be law and order, and it will be administered in large part by the liberally educated and well-trained graduates of our schools. Those schools will be guided, in the future, as they have been in the past, by this Association through the Section of Legal Education and by its offspring, the Conference of Bar Examiners.**

. . .

Our lawyers of the future must have . . . a more intensive and wider study of governmental principles now operating and which will become more important in the years to come.

Despite the crisis which confronts our law schools today, they have a future, quite immediate I believe, which will challenge the ablest leadership in the post-war period. The preparation time is all too short. **The opportunity is thrilling. . . . The interest of the public must be protected."** [152]

APPRENTICESHIP AND PROBATIONARY PLANS FOR ADMISSION TO THE BAR,

By William Alfred Rose
BAR EXAMINER, January 1944

As the war came to an end, the NCBE shifted from its' fit of desperate hysteria back into steadily trying to accomplish its goals. Promotion of prejudicial motives once again was couched in more obtuse terms. The innovative phrase used by Rose in this article refers to those:

> "who are not temperamentally or emotionally suited to the practice of law."

Rose favors a probationary admission system. He fails to disclose that the true purpose of such a system is to obtain control over the newly admitted attorney, thereby allowing the Bar to control litigation outcomes.

> "Attorneys have on many occasions voiced the opinion that the legal profession needs a plan **whereby it can effectively supervise the training and keep a watch on the conduct of applicants for admission to the bar during some reasonable period after they have completed their formal legal education and before they are permitted to become full fledged members of the profession**. It is thought that such a plan would help eliminate early in their careers some of those who have passed the bar examinations **but who are not temperamentally or emotionally suited to the practice of law**, and also might help to discover **those who do not have the moral stamina** to withstand the temptations which confront the practitioner.
>
> **. . .**
>
> It seems to be conceded generally by those who have studied the question that an effective probationary and apprenticeship plan, properly conducted, would be desirable and would prove beneficial to the profession**, particularly in the more populous communities**. . . . Possibly some of the objections might be removed if the term "probation" and its derivatives should not be used, because a young lawyer feels he is under a handicap if he is on "probation". Instead of using that term, the end can be accomplished by issuing a temporary license during the trial period. . . ." [153]

ON THE LEGAL EDUCATION FRONT,

Report of the Section of Legal Education and Admissions to the Bar
Sent on February 1, 1944 to the members of the House of Delegates of the American Bar Association
Bar Examiner, April-July 1944 (p.19-21)

The issue discussed in this Report is how admission standards should function after the war. The Report recognizes that there will be substantial pressure to relax standards once thousands of prospective attorneys return home. It then adopts the irrational position that notwithstanding how our soldiers fought for our country, standards should not be relaxed. It states:

> "Another phase of this problem relates to the maintenance of bar admission requirements in the various states. The Council anticipates that there will be heavy pressures to relax these standards when the men come back from the war. Indeed these pressures are already being encountered. It is a natural and very human impulse to want to make every possible concession for them. **Our gratitude to these men is very sincere and our desire to help them is genuine. It is the judgment of the Council, however, that relaxations in bar admission requirements for them cannot be justified."**

In conjunction, the following resolution was approved by the House of Delegates of the American Bar Association on September 13, 1944. It demonstrates how the profession valued its own economic interests, over those who risked their lives for our nation:

> "The American Bar Association has learned of relaxations in some states of the established standards of admission to the bar for men in the Armed Forces, and it anticipates movements aimed at further relaxations for returning veterans.
>
> **The American Bar Association is deeply conscious of the fact that the members of the legal profession, along with all members of the American public, owe a great debt of gratitude to the men and women in the Armed Forces. . . .**
>
> **The American Bar Association is firmly of the opinion, however, that it is a disservice to returning veterans to provide them with shortcuts for admission to the bar,** since such shortcuts would tend to make it possible and encourage admission to the bar without proper preparation. . . .
>
> **BE IT THEREFORE RESOLVED, That the American Bar Association is opposed to movements that would relax or tend to relax standards for admission to the bar and that it reaffirms its endorsement of the established standards of the Association. . . ."** [154]

POST-WAR REQUIREMENTS FOR ADMISSION TO THE BAR FOR SERVICEMEN,

By Silas H. Strawn, Former President of the American Bar Association and former Chairman of the Section on Legal Education and Admissions to the Bar
Bar Examiner, October 1944 (p.37-41)

In this article, the NCBE is up to its old tricks again. The author opposes relaxation of admission standards, and writes as follows:

> **"A stock argument against the necessity of a college education are the examples of John Marshall and Abraham Lincoln, neither of whom graduated from a college or a law school**. Both of these men were geniuses of uncommon, natural intellectual power and application. . . . There are few Marshalls and few Lincolns, and I submit that if these leaders were alive today and engaged in the practice of law they doubtless would have availed themselves of the abundant opportunities of this age for any young man, however poor he may be, to acquire a thorough education, if not, indeed, a college and law school training.
> . . .
> For some two years it was my privilege to be a member of the Illinois Committee on Character and Fitness. During that time there came before us for examination more than four hundred candidates. **The disparity between the applicants who had a college education and those who were less fortunate was not so manifest in the lack of technical knowledge requisite to passing the examination, but it was very evident in the application of the ethics of the profession and the moral obligation which rests upon a member of the bar."** [155]

The author's irrational and unsound premise is clear. He asserts that citizens with a college education are of higher moral character and quality, than those unable to attend college. Such an absurd perspective is irrational and statistically unsupported. Note the last sentence again. It reads:

> "**The disparity between the applicants who had a college education and those who were less fortunate was** not so manifest in the lack of technical knowledge requisite to passing the examination, but it **was very evident in the application of the ethics of the profession** and the moral obligation. . . ."

I submit that when viewed from the perspective that lawyers are generally well educated and also highly unethical in the view of most citizens, it is quite probable the exact converse of the author's position may be true.

DEVELOPMENTS IN THE IMPROVEMENTS OF STANDARDS OF BAR ADMISSION BETWEEN THE TWO WORLD WARS,

By Will Shafroth, Former Adviser to the Legal Education Section and Former Secretary of the National Conference of Bar Examiners,
Bar Examiner, October 1944 (p.43-48)

This article presents insight into the very early years of the admission standards movement. It states:

> "The American Bar Association ever since its inception has worked on the problem of proper standards of legal education, but made no real headway until 1921, when under the leadership of Elihu Root the Association adopted the standards which we have now. . . .
>
> **Elihu Root again was the chief instigator of that movement,** and he was the man at that conference who really carried the day. . . . If you ever want any arguments in your own particular states for upholding the standards, you need only to go back to the 1922 proceedings of the American Bar Association, where you will find the speeches made at that time by Mr. Root, Mr. Strawn, Mr. Taft and others. . . .
>
> . . . for the next three or four years the Council of Legal Education tried to promote this work. The members of the Council did their best by correspondence and in other ways, but they couldn't make much headway until Mr. Strawn became President of the American Bar Association in 1927 and applied business principles to our situation. Mr. Strawn . . . convinced the Executive Committee, that **we must have a full-time adviser who would go up and down the land and preach this gospel. . . .**
> **. . .**
> Our campaign for the standards was fairly expensive. . . . Therefore in the next few years one of our chief tasks was the effort of making the Conference of Bar Examiners self-supporting. In that Mr. Reed again was most helpful, and **it was he who suggested that we follow the procedure of the National Association of Certified Public Accountants**, whereby before a public accountant was recognized in a state other than the one in which he had been practicing, he had to be reported on and certified to the central organization, for which he paid a small fee. . . .
> **. . .**
> **. . . we simply have to remember that, although we owe every obligation to the men and women in the armed forces and want to do everything we can for them, we are not doing any kindness to the veteran when we admit him to the bar if he is not properly prepared. The paramount consideration, which has been pointed out time and time again, it was the keynote of Elihu Root's address back in 1922,-- the primary consideration is the public interest. . . . If we use that as our text, we shall reject anything that lowers the standards for admission to the bar. . . ."** [156]

MAINTAINING PROGRESS ON THE LEGAL EDUCATION FRONT,

By George Maurice Morris, Former President of the American Bar Association
Bar Examiner, October 1944 (p.49)

This article written by a former President of the ABA, is noteworthy for the manner in which it presents how the ABA's interests were embodied by religious elements to them. Morris writes:

> **"Inviting a lawyer to speak to the Section of Legal Education on the subject "Maintaining Progress on the Legal Education Front" is somewhat similar to inviting a preacher of the gospel to speak to a ministerial convention on the topic "Keeping Up the Fight Against Sin.". . .**
>
> Your program committee knows all this just as well as you and I do. Why then this invitation ? The answer must be that there are **those among you who have looked upon "Sin" with a smiling eye and need to hear again the word of the righteous.**
>
> You will recall that it was in 1921 at Cincinnati that after a tumultuous meeting of the Section and a not altogether subdued meeting of the Assembly, that the American Bar Association expressed its opinion. . . .
>
> **The Section's meeting, in particular, was an orator's field day. Because one of the specified standards was "at least two years of study in a college," the proponents of the standards were referred to, in informal conversation among the opposition, as "The Snobs." The opponents, who were impressed with the fact that Abraham Lincoln never went to either law school or college, were classified as "The Coon-Skin Cap Boys.**
>
> After the ceremonies at Cincinnati were concluded it was decided that what the movement next needed was a full dress parade. As a result a special meeting of the Conference . . . was called in Washington, D.C., for February 23 and 24, 1922. . . ." [157]

THREE NEW YORK RESOLUTIONS,

Bar Examiner, January 1945 (p.5-9)

In a small section titled as above, three resolutions adopted by the Committee on Legal Education of the Association of the Bar of the City of New York were published. One was incredible. The New York Bar irrationally attempted to justify excluding war veterans from admission on the ground that when they were educated by non-approved law schools (law schools that refused to succumb to unreasonably restrictive ABA standards), the veterans were exploited. It was a total perversion of logic. The Bar was seeking to promote its' own self-interest by relying on an irrational premise that those being excluded from membership were the ones the Bar was helping. The resolution stated:

> "WHEREAS, the G.I. Bill of Rights will make it possible for most of the veterans of the present war to pursue courses of education and training at the Government's expense in any approved institution . . . and **WHEREAS, the protection of veterans against exploitation by low standard law schools** . . . requires that the list of law schools which a veteran may attend at the Government's expense be restricted to law schools which maintain adequate educational facilities and standards; and WHEREAS, the American Bar Association, after careful consideration, has determined the minimum standards. . .
>
> RESOLVED: That it is the opinion of this Committee that **only those law schools which are approved by the American Bar Association should be included in the lists of approved institutions which a veteran may attend at the Government's expense. . . ."** [158]

TRADE BARRIERS TO BAR ADMISSIONS,

By H. Claude Horack, Dean of the School of Law of Duke University
Bar Examiner, January 1945 (p.10-16)

This article examines the credible allegations that the true purpose of restrictive admission standards was to protect the economic interests of the lawyers, rather than to further the public interest. Note the first sentence of the second paragraph below which reads, "These restrictions do not state this as their purpose." The author, H. Claude Horack writes as follows:

> "In recent years much attention has been directed to trade barriers which have been erected to protect local business activities from outside competition. **The profit motive has generally been the underlying cause of such restrictions in order to give advantage to local business**. Lawyers and physicians have always insisted that theirs was a profession and not a trade or business and should be conducted on a different basis. Yet, an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers.
>
> **These restrictions do not state this as their purpose** and it is probably true that in many and perhaps most cases objectives of a much higher nature were originally responsible for the restrictions which are found in a majority of the states. **However, they should be viewed as to their actual present-day effect rather than the motive which first suggested their adoption. Is their tendency to improve the profession, or to secure special privileges to a local group ?** It should be borne in mind that "the licensed monopolies which professions enjoy constitute, in themselves, severe restraints upon competition. . . .
>
> **. . .**
>
> A provision for the registration of law students has been adopted in a number of states. . . . It takes a well organized and efficient board of bar examiners, with a permanent office force and considerable funds at its disposal, (as in New York and Pennsylvania) to operate such a plan so as to make it even fairly effective in the elimination of unworthy candidates.
>
> **. . .**
>
> **But there is another way in which the bar can more adequately protect itself. . . . the bar can be much more adequately protected by asking the National Conference of Bar Examiners to make an investigation of the student not only at his school but at his home. . . .**
>
> **. . .**
>
> . . .The barriers such as residence and registration have grown up gradually and though perhaps at the beginning had no deliberate intention to place a bar to competency or freedom of choice of location, now, because of changes in viewpoints and conditions, are being used in some states with the deliberate intention of preventing entrance into the profession with the resultant protection of the lower portion of the bar that has not kept up with the changes and advancements. . . ." [159]

Note particularly the paragraph that reads:

> "But there is another way in which the bar can more adequately protect itself. . . . **the bar can be much more adequately protected by asking the National Conference of Bar Examiners to make an investigation of the student not only at his school but at his home. . . ."**

The foregoing sentence exemplifies how the character review process is used to further anticompetitive interests, rather than the public interest. A small footnote at the bottom of this article (which I concededly don't fully understand) states:

> "Upon being asked to judge a woman lawyer solely as a fellow attorney and to discard "the chivalry of the Deep South," a Mississippi lawyer wrote The National Conference of Bar Examiners:
>
> > "Neither do I think "the chivalry of the Deep South" affects the situation. This could go along very well with "Lavender and Old Lace" but it is very hard to keep up when the women are all putting on the pants or slacks with the seat dragging the ground and with a riveting machine under one arm and a pair of pliers and hammer in the hip pocket."

THE RESOLUTIONS,

Bar Examiner, July 1946

The Bar Examiner published that the NCBE adopted resolutions supporting the twisted thinking of the New York Bar in dealing with veterans. The resolutions stated:

> **"Whereas, it is in the interest of the Veterans . . . that Veterans should not be handicapped by inadequate preparation for the practice of law. . . .**
> **. . .**
> **Resolved, that the Executive Committee of the National Conference of Bar Examiners strongly urges that no action be taken which shortens the period or standard of training for such Veterans for admission to practice law. . . ."** [160]

Pure paternalism. If one accepts the above irrational premise adopted by the NCBE, then one would have to similarly accept the premise that making it easier for a Veteran to be admitted to the practice of law, has the effect of "harming" that individual. The NCBE makes no sense. Worse yet, they "lack candor", and "mislead" the reader by hiding their true reasons for maintaining unreasonably restrictive standards.

BAR EXAMINER, September 1947

The NCBE was under incredible political pressure regarding admission standards with respect to Veterans who had risked their lives for our country. While they attempted to remain steadfast in furtherance of their self-serving interests using the ridiculous argument that doing so was in the best interests of the Veterans, no one was buying into their ridiculous sales pitch. The rules were relaxed substantially for the Veterans. The September 1947 issue is devoted almost entirely to admission standards for Veterans.

In an article titled, "Should Veterans be Admitted on Motion?" the author, Lewis Ryan President of the New York State Bar Association addressed the issue. In doing so, however, he foolishly revealed that the legal profession's real goal, was to increase earnings of lawyers by reducing competition. Ryan writes:

> "Since I entered law school in New York State, the number of lawyers in New York State has trebled. **I think that the lawyer-veteran has a right to expect that he will have a fair opportunity to make a decent and an honorable living.** He certainly will not be able to do so if we now permit the law schools to double their enrollments, and permit inadequately trained men to be admitted wholesale without examination. If we do these things, I think we are doing the veterans a rank disservice and that we are doing the profession and the public a rank injustice." [161]

16

McCARTHYISM and STATE BAR ADMISSIONS

"These cases, which concern inquisitions . . . are relics of a turbulent period known as the "McCarthy era," which drew its name from Senator Joseph McCarthy from Wisconsin."

In Re Stolar, 401 U.S. 23 (1971) Majority opinion by U.S. Supreme Court Justice Hugo Black

The purpose of this section is to demonstrate that McCarthyism is the foundation of the State Bar admission process today, just as U.S. Supreme Court Justice Hugo Black correctly recognized in 1971. The fear of Communism, known as the "Red Scare," which permeated virtually all facets of American life during the 1950s became a cornerstone power bloc for the State Bars. The U.S. Supreme Court cases of *Konigsberg, Schware, Anastaplo, Stolar, Baird* and *Law Students Civil Rights Council,* (discussed subsequently herein) all dealt in one way or another with Bar application questions that inquired into the associations of an Applicant.

Senator Joseph McCarthy was the most notorious instigator of the Red Scare. His tactics were predicated on making unfounded accusations against individuals, with the result that the mere allegation served to destroy the person's credibility. Ultimately, he overplayed his hand and was exposed on national television as a buffoon. He was censured by the U.S. Senate and McCarthyism was for the most part, then discredited. There was one place however, one institution, where it quietly survived and still flourishes today. That place is the State Bar where the exact same tactics used by McCarthy still prevail. As previously discussed, the Bar admissions character review process gained the bulk of it's power during the 1930s. World War II however, led to a diminishment of that power. McCarthyism provided the State Bars with the opportunity to recoup what they lost during World War II.

Unsurprisingly, McCarthy prior to becoming a U.S. Senator was a Wisconsin attorney and Judge. It is clear that McCarthyism has its' roots in Joe McCarthy's judicial background, his experience in the legal profession and dealings with the State Bar. He honed his ruthless tactics by learning from the State Bar. To this day, McCarthy's home state of Wisconsin is one of the most egregious violators of the Constitution with respect to the admission process, as will be demonstrated in the Section of this book discussing admission cases in the various states.

During his short-lived height of power, when virtually every member of the U.S. Congress feared him, McCarthy was essentially a demagogue. He was extremely charismatic possessing great leadership qualities, but lacking markedly in intellectual knowledge. Academically, he was a poor writer, and he did not read much. He typically relied on shortcuts and bluffing techniques. In 1939, at age 30 he became the youngest man ever elected to be a circuit judge in Wisconsin. As a Judge, he had a reputation for possessing a shrewd ability to get to the heart of a matter. On the negative side, he was not a student of the law, lacked comprehension of the rules of evidence and often intentionally made sly remarks in the presence of the jury for the purpose of influencing the outcome of a case. He was also known to admire Adolf Hitler's book, Mein Kampf and would point to the book in his chambers when local attorneys were present, noting that was the way to get things done. Throughout his career, his adversaries accused him of being a Nazi. Certainly, the political tactics he learned from the State Bar and utilized, supported the assertion. One of his biographers, Thomas C. Reeves tells the following story about McCarthy as a Wisconsin Judge:

> "When Lappley requested an immediate or at least early trial to appeal the order, he later explained, Joe launched into a lengthy discourse about the entire case. He said that a trial would be a "waste of the court's time,". . . .
>
> Four days later Lappley petitioned the Wisconsin supreme court for a writ of mandamus. The supreme court responded immediately and requested all of the records in the case. **When the documents arrived, a page was discovered missing from the trial record, and the court demanded an explanation. Joe claimed that after the June 7 hearing he had read some flattering remarks about Lappley into the record at the attorney's request. He had recently ordered that portion of the record destroyed. . . . (Joe told friends privately that his action was pure revenge, prompted by Lappley's sudden decision to appeal.)** Joe no doubt also sought to conceal from the supreme court his informal comments on the case, in particular his assertion that a trial would be a waste of time. . . .
>
> The supreme court issued an opinion shortly . . . sharply rebuking McCarthy. . . ." [162]

In 1946, while still a circuit Judge, McCarthy ran for election to the U.S. Senate as a Republican. In doing so, he flouted judicial ethics. The *Milwaukee Journal* called for his withdrawal from the race on the ground that he was barred from holding any political office other than judicial, during the term he was elected to be a circuit judge. McCarthy was undeterred and during the campaign even had the audacity to publish a newspaper advertisement citing four of his judicial decisions with the headline "Labor Record of Judge Joe McCarthy, Candidate for U.S. Senator." It was a complete slap in the face to judicial ethics. Nevertheless, he was elected and when the issue of whether he could run for the U.S. Senate while still a State Circuit Judge was heard before the State Supreme Court, they ruled in his favor. As a Senator, he formed strong political alliances with Senator Richard Nixon and FBI Director J. Edgar Hoover, both of whom also contributed to instigating the Red Scare, and supported Congressional Hearings pertaining to the loyalties of U.S. State Department employees. He also became an alcoholic while a Senator. As his obsession with Communism grew, and his alcoholism instensified he lost most of his charisma.

On March 21, 1947, President Harry Truman in response to public fears of Communism issued an Executive Order drastically altering conditions for federal employment. Under the Order, all persons entering employment in the Executive branch would be subject to extensive investigations of past activities and associations, including examination of school records and inquiries of former employers and personal references. The doctrine of guilt by mere allegation became the cornerstone of implementing the Order and gave birth to McCarthyism. Testimony about federal job applicants was accepted from people who wanted their identities to remain confidential. Job applicants did not know the identity of their accuser. Shortly thereafter, in November, 1947, the Attorney General issued a list of 82 organizations that the FBI considered disloyal and more names were subsequently added. The standard for denying employment under the Executive Order was stated ambiguously as:

> "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the government. . . ." [163]

In 1949, McCarthy believed reports that the U.S. Army had tortured confessions out of Nazi SS men after the war, and gave them a sham trial. In support of the Nazi prisoners of war, he launched a political attack on the U.S. Army. Ultimately, the highly inflammatory reports were determined to be

substantially meritless after a Congressional investigation. McCarthy however, claimed that the Congressional Committee had whitewashed the alleged atrocities. He issued a press release that stated:

> " I accuse the subcommittee of being afraid of the facts. I accuse it of attempting to whitewash a shameful episode in the history of our glorious armed forces. . . ."

He subsequently delivered a speech on the Senate floor condemning the Congressional hearings. His speech contained numerous factual errors. He recklessly treated allegations in prisoner affidavits as self-evident truths, even if unsupported by countervailing facts. This tactic became his modus operandi. It was also the chief cause of his downfall. He would shoot from the hip, without being certain of the legitimacy or logic of his position. His attack on the U.S. Army coupled with his support of Nazi prisoners gave him a reputation as a Nazi sympathizer. In 1954, during Hearings attempting to drive him from the Senate, Senator Flanders characterized McCarthy's involvement as fitting in:

> "neatly with other parallels between the amateurish senator from Wisconsin and the accomplished and successful dictator of Germany." [164]

In 1951 and 1952, his financial dealings came under attack. It was alleged that he had welched on a $ 5,500 gambling debt in a wild dice game. Senator Thomas Hennings a member of the committee investigating McCarthy commented:

> ". . . if a man wants to engage in gambling games and pays a debt or does not pay it, that is not a matter the United States Senate is really concerned with." [165]

As McCarthyism gained steam in the 1950s, almost everyone was viewed as a possible Communist. McCarthy's attacks and allegations concentrated predominantly on the U.S. State Department, U.S. Army, and journalists. Most were ultimately proven to be untrue. By the same token however, he threw out so many allegations at so many individuals that a few were proven to be factually correct in later years. The overwhelming majority of people who had their careers and credibility destroyed as a result of McCarthyism were innocent of the allegations made.

On June 1, 1950, the Senate's only woman member, freshman Republican Margaret Chase Smith of Maine read on the Senate floor a "Declaration of Conscience," which she and six other Republican Senators signed that was a stern attack on McCarthyism. On June 6, 1950 Governor Earl Warren of California, later to become Chief Justice of the U.S. Supreme Court, also declared against McCarthyism. President Truman and the U.S. State Department joined in the attack. The State Department accused McCarthy of a "rape of the facts" and declared that "the facts do not deter him from his reckless course."[166] McCarthy labeled Mrs. Smith and her co-signers as "Snow White and the Seven Dwarfs." He continued undeterred. In fact, due to substantial support from the general public, he had not yet nearly reached the apex of his power which would peak in 1953.

On July 17, 1950 the Tydings Committee of the Senate issued a report on an investigation spearheaded by McCarthy pertaining to the arrest of six people on charges of conspiracy to violate the Espionage Act. Those arrested included two co-editors of the publication *Ameriasia,* and a writer for *Collier's* magazine. [167] The Senate Report was a scathing indictment of McCarthy. It characterized McCarthy's charges and methods as:

> "A fraud and hoax perpetrated on the Senate of the United States and the American people. They represent perhaps the most nefarious campaign of half-truths and untruth in the history of this Republic." [168]

It further stated:

> "For the first time in our history, we have seen the totalitarian technique of the "big lie" employed on a sustained basis. The result has been to confuse and divide the American people. . . ." [169]

The impact on the general public of the Tydings Report was entirely negated by J. Edgar Hoover's "coincidental" announcement of the arrest of Julius Rosenberg to commit atomic espionage on the exact same day the Tydings Report was released. [170] If anything, McCarthy's standing was enhanced rather than diminished. In February 1952, McCarthy told an audience in Wisconsin that the nation's leadership was "almost completely morally degenerate" and that the President was a "puppet on the strings." [171] McCarthy assessed "moral character" in a manner similar to State Bar admission committees. Good moral character constituted that which he wanted and believed. Anything else was "degenerate." Senator William Benton on the Senate floor compared McCarthy's tactics to Hitler. [172] Dishonest exploitation of "moral character" assessment was the foundation of McCarthyism and is similarly the foundation of the State Bar admission process today.

When Eisenhower was elected, McCarthy's political position was initially boosted. McCarthy supporter Scott Mcleod who served as assistant Secretary of State for Security Affairs, in his first three weeks on the job, fired twenty-one State Department employees for alleged homosexuality. He and a team of nearly two dozen ex-FBI agents examined desks, drawers, file cabinets, employee reading matter during and after working hours, in pursuit of alleged subversives. They forced the State Department to operate in a virtual police-state atmosphere. Later in the year, McLeod proudly announced that 306 citizen employees and 178 aliens had been removed from employment on numerous grounds without a single hearing. [173] When Charles E. Bohlen, a counsellor of the State Department and former interpreter and adviser at Yalta was announced to become the new U.S. ambassador to the Soviet Union, an FBI report revealed a small quantity of derogatory information. It was predicated on anonymous letters and hearsay reports, including one report from a person who claimed to have a "sixth sense" that detected immorality in Bohlen. [174] On February 19, 1953 the State Department issued Information Guide 272 which banned the books, music and paintings of Communists from the Voice of America and ordered overseas librarians to remove all publications written by "controversial" authors. One official stated:

> "No one seems interested in the truth. If you quit it looks like some tacit admission of guilt. If you protest, it is insubordination, and you might find yourself suspended." [175]

Fear of persecution by the Congressional subcommittee caused Raymond Kaplan, a 42-year old Voice of America engineer, to commit suicide by jumping in front of a truck. In a farewell letter to his wife and son, Kaplan wrote:

> "You see, once the dogs are set on you everything you have done since the beginning of time is suspect. . . . I have never done anything that I consider wrong but I can't take the pressure upon my shoulders any more. " [176]

In 1953, President Eisenhower issued Executive Order 10450, which took Truman's Order pertaining to investigation of Federal employees even further. Eisenhower's Order subjected all present and future employees of the Executive Branch to a broad character scrutiny. It allowed for the firing of employees based on personal traits such as alcoholism, homosexuality or "infamous" conduct unrelated to loyalty to the government.[177] But On July 24, 1953, Arthur Eisenhower, the President's brother called McCarthy "the most dangerous menace to America." "When I think of McCarthy," he told a

reporter, "I automatically think of Hitler." "He is a throwback to the Spanish inquisition."[178] In 1953, Senator Everett Dirksen declared:

"Government employment is **not a right, it is a privilege**."

McCarthy stated in June, 1953 that anyone who invoked constitutional rights in refusing to tell a congressional committee about communist party membership is obviously a communist. He would repeatedly assert that the right to remain silent was a shield for the guilty, although the U.S. Supreme Court had held it was designed to protect the innocent from an overly intrusive government. Similar to the State Bar admission process, congressional witnesses were asked about the occupations of brothers, sisters and relatives. It was anything and everything goes. Congressional committees wanted to know everything without exception. Just like the State Bar admission committees. In November, 1953, Ex-President Harry Truman in a nationally televised broadcast vehemently attacked McCarthyism, defining it as follows:

> "It is the corruption of truth, the abandonment of our historical devotion to fair play. It is the abandonment of the "due process" of law. It is the use of the big lie and the unfounded accusation against any citizen in the name of Americanism or security. It is the rise to power of the demagogue who lives on untruth. . . ."[179]

McCarthy then made a huge blunder. He not only attacked Truman which was not unexpected, but he also condemned Eisenhower. Eisenhower's reputation was impeccable throughout the nation. McCarthy followed up with another political attack on the Army which infuriated Eisenhower. When McCarthy turned on his own Republican President, his downfall began. While there was always friction between the Democrats and McCarthy, he now found vast numbers of Republican Senators and Congressman withdrawing their support from him. When his long-time ultra-conservative ally Vice-President Richard Nixon withdrew support in 1954, McCarthy's political career was in ruins. In May, 1954 his fate was sealed and his public image conclusively tarnished when he was required to testify before a Congressional Committee. The Hearings were nationally televised and <u>he ended up doing specifically and exactly that which he had criticized so many other witnesses for doing</u>. He refused to answer questions before Congress. It was unbelievable. A small excerpt was as follows:

> Mr. Welch: The oath included a promise, a solemn promise by you to tell the truth. . . . Is that correct, sir?
>
> Senator McCarthy: Mr. Welch, you are not the first individual that tried to get me to betray the confidence and give out the names of my informants. You will be no more successful than those who tried in the past, period.
>
> Mr. Welch: I am only asking you, sir, did you realize when you took that oath that you were making a solemn promise to tell the whole truth to this committee?
>
> **Senator McCarthy: I understand the oath, Mr. Welch.**
>
> **Mr. Welch: And when you took it, did you have some mental reservation, some Fifth-or Sixth-Amendment notion that you could measure what you would tell?**
>
> **Senator McCarthy: I don't take the Fifth or Sixth Amendment.**

Mr. Welch: Have you some private reservations when you take the oath that you will tell the whole truth that lets you be the judge of what you will testify to?

Senator McCarthy: The answer is there is no reservation about telling the whole truth.

Mr. Welch: Thank you, sir. Then tell us who delivered the document to you.

Senator McCarthy: The answer is no. You will not get that information. [180]

McCarthy was politically demolished after the televised hearings. He was subsequently censured by the Senate and wholly discredited. For the short remainder of his career on Capitol Hill, he was an obstructionist that no one took seriously. He was the only Senator to vote against confirmation of the Great William Brennan, Jr., to the United States Supreme Court. [181] In May, 1957 he died of cirrhosis of the liver due to his alcoholism.

That is the heart and soul of the modern day State Bar admissions process. The Bars make an unreasonably cumbersome inquiry into every single facet of an Applicant's life. Everyone has something that is mildly incriminating. Once the State Bar's ruthless investigative tactics find that minor and often immaterial fact, they then have discretion to deny admission. They will admit the Applicant if they like them, and deny admission if they don't. If admission is denied, it won't ostensibly be based on attitude, appearance or beliefs, but rather instead on the incriminating information unconstitutionally obtained. Substantively however, the true reason for the denial is that the admissions committee just doesn't like the person for some irrational reason.

The manner in which questions are phrased during a Bar admission interview can unavoidably result in tripping the Applicant up on the way they answer. Mildly incriminating responses are irrationally elevated by the Bar to support an inference that an Applicant lied or tried to conceal information. Socrates proved long ago, that just by questioning an individual, you can lead them to support any conclusion you desire, regardless of what the true facts are. That is the way the State Bar admissions process works, and that is the essence of McCarthyism. McCarthyism is discredited. The contemporary Bar admission process is a relic of the turbulent period known as the McCarthy era, as Justice Hugo Black correctly stated.

His testimony before Congress on national TV should serve as a good lesson to State Bars which predicate their admission process on tactics of McCarthyism. They use overbroad inquiries into personal matters to find small bits of derogatory information. Through manipulative questioning they overinflate the significance of such matters. And then of course, they exempt licensed attorneys and Judges from being required to provide the same type of information on a periodic basis.

The lesson for the State Bars from McCarthy's testimony is as follows. The same technique that State Bars use against Bar Applicants can ultimately be turned against the Bar inquisitors. No one is morally perfect. We all have our faults, flaws and weaknesses. Assessing another person's moral character, as the U.S. Supreme Court has stated is a "dangerous instrument." Dangerous instruments should not be used against Bar Applicants. Rather instead, the dangerous instrument of character assessment should only be used with respect to acts of conduct that shock the moral conscience.

Otherwise, there is no doubt that like Joseph McCarthy, the State Bars, and Judges who support the legal profession's anticompetitive goals, will find out, that what goes around, comes around.

NOTE: The presentation of most facts about Joe McCarthy's life herein is based on his biography: **Thomas C. Reeves**, *The Life and Times of Joe McCarthy* (Madison Books, Maryland, 1997).

17

SIX WARNING SIGNS OF A STATE BAR IN NEED OF AN ATTITUDE ADJUSTMENT

In addition, to the overall character assessment process which constitutes the bulk of this book, my research of the State Bar admissions process has identified six key warning signs that I believe indicate a State Bar is trying to wrest control of litigation outcomes from the Courts by subverting the adversarial process. Typically, the existence of these warning signs in a State Bar is indicative that the discretionary element of character assessment is probably being abused by the State Bar admissions committee. The prevalence of these warning signs tend to flourish during periods of political conservatism and dissipate during periods of liberalism. Each one of the warning signs represents a danger to the public interest, yet each one is unsurprisingly publicized for propaganda purposes by the State Bars as intended to promote the public interest. They each have the effect of either increasing State Bar control over the attorney's individuality and freedom, or decreasing the number of licensed attorneys in the marketplace. The warning signs to beware of within any state's legal profession are as follows:

1. **LAW STUDENT REGISTRATION** - The first early warning sign of a State Bar that needs to have its' power curbed is when it requires law students to be subjected to character assessment. This was described in several of the Bar Examiner articles previously discussed. The policy is designed to establish control over the student from the point they enter into the surreal world of the legal profession to ensure that the potential lawyer will adapt to the State Bar's group thought objectives. It is no doubt easier to maintain reins on a person's thought process, if control is established from inception.

2. **PROBATIONARY ADMISSION** – When a State Bar allows probationary admission, it does so to control how the person litigates by leveraging their law license. The concept is that by holding out the "carrot" of full admission, the "pseudo-attorney" will not take action adverse to economic interests of other attorneys. The obvious dilemma created is that it is unfair for that lawyer's client to be represented by an attorney on probation, when the opposing party has someone representing them whose law license is not hanging by a thread. The probationary attorney's clients are at a marked disadvantage compared to other litigants.

3. **HIGH APPLICATION FEES** – During the 1990s, many State Bars began raising admission fees to ridiculously inordinate levels in order to reduce competition amongst lawyers in their state. Some State Bars today charge as much as $ 1,000.00 just to file an application. When it costs roughly $ 150.00 to file an application to become a licensed CPA, and $ 1,000.00 to become a licensed attorney, the fee is irrefutably serving purposes beyond covering necessary costs. High application fees are designed to reduce competition in order to increase the cost of legal services to the general public.

4. **LAW PRACTICE MANAGEMENT PROGRAMS** – Ostensibly designed to provide free assistance to the licensed attorney regarding matters involved in running a law practice, these programs sponsored by the Bars are in truth intended to allow the State Bar to have their "finger in the pie" so to speak. It allows them to informally discover how lawyers conduct themselves. Primarily, these programs are an initial step towards further involvement by the State Bar in the lawyer's practice. Think of it. If all lawyers use and follow the advice of State Bar Lawyer Practice Management programs, then all lawyers will function in a uniform manner. Once again, the group rather than the individual dominates. Creative ingenuity and inventiveness is subjugated. Lawyers who don't function in accordance with the State Bar's advice are then ostracized by their peers, with the result that their clients inevitably suffer the consequences. The Courts will then predicate decisions not on the facts, evidence and law, but instead upon which party has counsel supporting State Bar doctrine. State Bar doctrine is obviously rooted in the economic interests of lawyers.

   In the 1990s, one of the areas of Law Practice Management that the State Bars concentrated on was malpractice insurance. Attorneys within a particular State are typically encouraged to use malpractice insurance companies endorsed by the Bar. This is a particularly worrisome warning sign, since a malpractice cause of action is normally accompanied by a breach of the rules of ethical conduct. By endorsing certain malpractice insurance companies, the State Bar's disciplinary function suffers from a conflict of interest. An incentive is created for the State Bar to treat lawyers who purchase malpractice coverage from Bar-Endorsed insurance companies more leniently in the context of discipline, compared to those attorneys who purchase coverage from other companies. In fact, since 1977 the Oregon State Bar has taken this concept to such a ridiculously egregious level that it has required Oregon attorneys to purchase malpractice coverage directly from the State Bar itself. Oregon lawyers who fail to do so have their law license suspended. The result is that judicial rulings in Oregon are predicated on State Bar financial interests and the disciplinary function is wholly illegitimated.

5. **LAWYER ASSISTANCE PROGRAMS** – These programs ostensibly designed to provide free assistance to lawyers suffering from emotional problems or substance abuse such as alcoholism or drug addiction, are in truth designed to involve the State Bar in the most personal aspects of the lawyer's life for the purpose of leveraging their professional conduct. Once the Bar identifies the lawyer's emotional and physical weaknesses, it has enormous leverage over that lawyer. Lawyer Assistance Programs are falsely promoted to members of the Bar, as being totally and completely confidential. As will be seen later in this book, that purported confidentiality has in many instances been breached. In fact published appellate opinions demonstrate that these programs are often used to obtain evidence against an attorney for use in a disciplinary proceeding against the attorney. I fervently believe that if a lawyer has an emotional or physical problem, by all means they should seek professional help. They are nothing short of a moron however, if they seek such help from any program sponsored by the State Bar that licenses them.

6. **STATE BAR RULES AND COURT RULES DESIGNED TO FRUSTRATE THE LAWYER'S FIRST AMENDMENT FREE SPEECH RIGHTS -**

   This last warning sign is the most serious. When the State Bar threatens the lawyer's First Amendment free speech rights by curbing the lawyer's ability to criticize the Judiciary, or the State Bar, the general public loses the assistance of those individuals who are most capable of protecting their constitutional freedoms. From the Bar's perspective, the concept is ideal. If the

lawyer speaks out against the Judiciary or State Bar, then simply revoke their law license. They are then no longer an economic threat to financial interests of the legal profession. Historically, all governments have attempted to trim the ability of their citizens to freely express opinions. The United States has been no exception. It is well known amongst historians that in this nation we have had three major congressional enactments that violated the First Amendment. Each one was given a name designed to create a false impression that anyone who violated the statute were sinister criminals. In fact however, all three congressional statutes, each of which ultimately fell by the wayside, covered a substantial amount of constitutionally protected speech that was of the most innocent and peaceful nature. In the late 1790s, the Alien and Sedition Acts were adopted by Congress. They were quickly condemned by James Madison and Thomas Jefferson. The so-called "Espionage Act of 1917," a statute possessing an obviously sinister title, was an enactment that made criticism of governmental policies a crime. It resulted in the successful prosecution of numerous pacifists. In one famous "Espionage" prosecution, *Masses Publishing Co. v. Patten*, the government asserted that publishing a cartoon labeled "Congress and Big Business" constituted espionage. The Smith Act of 1940 forbade teaching, advocating or abetting communistic doctrine. Similar issues pertaining to advocacy of communism and associations became a focal point in six major U.S. Supreme Court cases on State Bar admissions.

In the 1990s and into the early 21st century, the State Bar's modus operandi of curbing free speech rights of lawyers has focused on disingenuous State Bar notions of "civility," and "professionalism." The professed concept is that lawyers should be nice, civil and respectful to each other. Ostensibly, the notion is appealing. The problem occurs however, when passionately disagreeing with another lawyer, a State Bar or a Judge's viewpoint in a nonabusive manner; is falsely characterized as being uncivil or disrespectful. Many of the most egregious and unconstitutional appellate opinions on Bar admission have focused on irrational characterizations by Bar Committees that the Applicant has been disrespectful, uncivil, glib, facetious, sarcastic, or arrogant. Notions of "civility" and "professionalism" can be used as "dangerous instruments" by the Judiciary to subjugate attorneys with a strong sense of justice and true love for the interests of the general public. Enactment of rules mandating civility, cooperation and professionalism are the most serious warning signs that a State Bar is attempting to curb the ability of an attorney to provide zealous, passionate and brave representation to a client. Some of the State Bars have within the last decade gone so far as to ridiculously and falsely characterize criticism of the Judiciary as falling within the category of "conduct prejudicial to the administration of justice." Prohibitions or punishments in the form of professional regulation designed to subjugate the lawyer's free speech rights are a significant step towards a totalitarian legal profession. If lawyers can not exercise their own constitutional rights, there is no way they can protect the rights of their clients.

18

UNITED STATES SUPREME COURT CASES

EX PARTE GARLAND, 71 U.S. 333 (1866)

The Civil War had ended. A.H. Garland, Esquire who was admitted to practice law before the United States Supreme Court in 1860, followed his home state of Arkansas when it seceded from the Union and became a member of the Confederate Senate. After the war, he received a Presidential Pardon and wanted to résumé practice before the U.S. Supreme Court. Congress had passed a legislative act prohibiting any person from being admitted to the Bar of the Supreme Court, unless they subscribed to a loyalty oath. Garland challenged the constitutionality of the act. The Supreme Court ruled in Garland's favor. The lead opinion was written by Justice Stephen Field. It conclusively established that the ability to practice law was a "Right," not a "Privilege". Justice Field wrote:

> **"The attorney and counselor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency.**
>
> The legislature may undoubtedly prescribe qualifications for the office to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in the case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."

A Dissenting opinion by Justice Miller set the stage for numerous opinions of state courts in subsequent years during the ABA and NCBE's rise to power that would falsely assert the ability to practice law was a "Privilege," rather than a "Right." Yet, even in doing so, Miller could not help to refer to it as a "Right." Justice Miller states in his Dissent:

> "The **right** to practice law in the courts as a profession is a **privilege** granted by the law **under such limitations or conditions in each state or government as the lawmaking power may prescribe. It is a privilege, and not an absolute right**. . . .
>
> Attorneys are often deprived of this **right** upon evidence of bad moral character or specific acts of dishonesty which show that they no longer possess the requisite qualifications." [182]

IN RE SUMMERS, 325 U.S. 561 (1945)

Petitioner Summers complied with all prerequisites for admission to the Illinois Bar, but was a conscientious objector who opposed the use of force for religious reasons. He refused to advocate force to meet aggressions no matter how aggravated, even if he was in danger of bodily harm. He was a believer in passive resistance without exception. Due to his conscientious objection to military service, he refused to take the required oath. That was the sole ground on which the Illinois court denied admission. Petitioner Summers described denial of his admission as follows:

> **"The so-called "misconduct" for which petitioner could be reproached for is his taking the New Testament too seriously. Instead of merely reading or preaching the Sermon on the Mount, he tries to practice it. The only fault of the petitioner consists in his attempt to act as a good Christian in accordance with his interpretation of the Bible, and according to the dictates of his conscience. We respectfully submit that the profession of law does not shut its gates to persons who have qualified in all other respects, even when they follow in the footsteps of that Great Teacher of mankind who delivered the Sermon on the Mount. We respectfully submit that, under our Constitutional guarantees, even good Christians who have met all the requirements for the admission to the bar may be admitted to practice law."**

The sincerity of his beliefs was never questioned. The Illinois Bar did not deny that he was honest, moral, intelligent, had never been convicted of, or charged with violating any law. He also was a law professor. The Illinois Bar did not contest that he would serve his clients faithfully. He explained his reasons for wanting to be a lawyer as follows:

> "I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor."

Summers told his examiners that he would, if he could, obey to the letter the precepts of Christ to:

> "Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also"

In a 5-4 decision, the U.S. Supreme Court ruled against him. Justice Reed writing for the Court, first indicated the ability to practice law was a "Right":

> "A claim of a present **right** to admission to the bar of a state and denial of that **right** is a controversy. . . . it is a case which may be reviewed under Article III of the Constitution . . . ."

The Court then ruled that Summers' inability to take the oath to support the constitution of Illinois, which required a willingness to serve in the armed forces, was sufficient grounds for denying admission. The Court reasoned that since it was his inability to take the oath in good faith that constituted the ground for denial, he was not denied admission because of religious beliefs. A Dissenting opinion was written by the Great Justice Hugo Black. He was joined by Justices Douglas, Murphy and Rutledge. In years to come Justices Black and Douglas would write several Dissenting opinions on this subject. Justice Black wrote as follows, clearly asserting the ability to practice law was a "Right" rather than a "Privilege":

"The State of Illinois has denied the petitioner the right to practice his profession and to earn his living as a lawyer. It has denied him a license on the ground that his present religious beliefs disqualify him for membership in the legal profession. The question is therefore whether a state which requires a license as a prerequisite to practicing law can deny an applicant a license solely because of his deeply rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to the Bar set by the State demonstrates beyond doubt that the only reason for his rejection was his religious beliefs.

. . .

Test oaths, designed to impose civil disabilities upon men for their beliefs, rather than for unlawful conduct, were an abomination to the founders of this nation.

. . .

Under our Constitution, men are punished for what they do or fail to do, and not for what they think and believe. Freedom to think, to believe, and to worship has too exalted a position in our country to be penalized on such an illusory basis." [183]

SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO, 353 U.S. 232 (1957)

This is a landmark case pertaining to Bar admissions. It is still cited today. Rudolph Schware was denied admission to the New Mexico Bar on character grounds due to several arrests over a decade preceding his application. The arrests were for participating in labor protests. Additionally, he was a member of the Communist Party more than 10 years prior to applying for admission, and had used several aliases. He was never prosecuted or convicted of any crime. He served in the armed forces during World War II and received an honorable discharge. At the time of his application, he was married with two children, and actively involved in the community. His conduct during law school was exemplary. Schware was born in a poor section of New York City in 1914, and grew up in a neighborhood inhabited by immigrants. His father was an immigrant. From the time he left school until 1940, he worked at temporary jobs. In 1933, he found work in a glove factory, and participated in an effort to unionize the employees. Since the workers were principally Italian, he assumed the name of Rudolph Di Caprio. Wherever employed, he was an active advocate of labor organization.

Schware filed a complete and truthful application. The application however did not request disclosure of any information related to membership in the Communist Party. The Bar however, received confidential information that he had once been a member. At a Bar Hearing, although he testified truthfully about his membership in the Communist Party, the Board refused to let him see the confidential information against him. **Further, even though they used that information for purposes of denying his application. they did not make it part of the record of the hearing.** When he petitioned the New Mexico Supreme Court, the members of that Court purportedly did not look at the confidential information. The whole thing had the appearance of being very sinister and Machiavellian in nature. The State contended that although the use of aliases, the arrests and membership of the Communist Party would not justify exclusion if each stood alone, when all three were combined, the exclusion was not unwarranted. The U.S. Supreme Court ruled in favor of Schware. Justice Black who wrote the Dissent in Summers, now wrote the lead opinion which states:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. **Even in applying permissible standards, officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory**. . . .
>
> . . .
>
> **There is nothing in the record which suggests that Schware has engaged in any conduct during the past 15 years which reflects adversely on his character**. . . . From the record, it appears he is a man of religious conviction, and is training his children in the beliefs and practices of his faith. . .
>
> . . .
>
> **The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct**. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.
>
> . . .
>
> There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."

Justice Frankfurter wrote a concurring opinion that was joined by Justices Clark and Harlan. It states:

> ". . . the judgment here challenged involves the application of a conception like that of "moral character," which has shadowy, rather than precise bounds.
> . . .
> **Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here."**

One of the most interesting aspects of the opinion is Footnote 5, which states:

> "We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." [184]

Justice Black cited <u>*Garland*</u>. <u>*Garland*</u> irrefutably asserted that the ability to obtain a law license is a "Right". <u>*Garland*</u> written in 1866, was still good law on this issue in 1957, almost a hundred years later.

KONIGSBERG V. STATE BAR OF CALIFORNIA, 353 U.S. 252 (1957)

Two absolutely incredible cases. The Konigsberg admission cases were decided by the U.S. Supreme Court twice. First, in 1957 and then in 1961. Two opinions, diametrically opposed to each other and on the exact same issue. Both times the case was decided by slim 5-4 decisions. Justice Black wrote the lead opinion in Konigsberg I and a stinging Dissent in Konigsberg II. Justice Harlan wrote a stinging Dissent in Konigsberg I and the lead opinion in Konigsberg II.

First, I will review Konigsberg I and then its follow-up in 1961. Here are the facts. In 1954, Raphael Konigsberg was denied admission to the California Bar on character grounds. He was born in Austria and brought to this country at age 8. He was an immigrant which as stated previously, the Bars detest. The California Committee refused to certify him. The Committee conducted hearings on his application that were directed at finding out whether he had ever been a member of the Communist Party. They questioned him at length about his political affiliations and beliefs. He refused to answer, insisting the questions were an improper intrusion on his First Amendment rights.

Initially, there appear to be two issues facing the Court. First, whether the refusal to answer a question, in and of itself constitutes grounds for denying admission. Second, whether the record demonstrated adequate evidence to deny admission on character grounds. Here's where it gets real interesting. The Supreme Court in the first case determined that the refusal to answer was not relied on by the Bar Committee as the basis for denying admission. It then ruled in Konigsberg favor on the second issue. Justice Black wrote the lead opinion. The Court sidesteps the issue of whether refusal to answer Bar examiner questions constituted legitimate grounds to deny admission stating:

> "He was not denied admission to the California Bar simply because he refused to answer questions.
>
> In Konigsberg's petition for review to the State Supreme Court, there is no suggestion that the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee, in its answer, indicate that this was the basis for its action. . . .
>
> There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee which has been called to our attention that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character . . . Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable . . .
>
> . . .
>
> If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. . . ."

The Court then went on to hold that the evidence was not sufficient to demonstrate he should be denied admission on moral character grounds. It is somewhat similar in nature, to the ***Schware*** case. Based on the Court's opinion, it would seem Konigsberg would then be admitted to the Bar. The Court definitively and expressly reversed the California Bar's refusal to admit him. Justice Black's opinion concluded as follows:

"We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner, nor in such way as to impinge on the freedom of political expression or association. **A bar composed of lawyers of good character is a worthy objective, but it is unnecessary to sacrifice vital freedoms in order to obtain that goal.** . . . In this case, we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. **Without some authentic, reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law**. . . . A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.

The judgment of the court below is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded." [185]

The Court's opinion however, as stated previously did not directly and conclusively resolve the issue of Konigsberg's refusal to answer the Bar's questions. This then became the issue in Konigsberg II.

KONIGSBERG V. STATE BAR OF CALIFORNIA, 366 U.S. 36 (1961)

One would not expect to see this case again at the U.S. Supreme Court after the conclusion and extensive analysis in Justice Black's lead opinion the first time. Logic would dictate that Konigsberg would be immediately admitted. What happened instead is amazing. On remand to the California Supreme Court, Konigsberg predictably moved for immediate admission. The State Supreme Court vacated its previous order and referred the matter to the Bar Committee for further consideration. The Bar Committee again held hearings. Konigsberg was right back where he started!! The Committee asked him the exact same questions and he again refused to answer. It was absolutely unbelievable!!

The California Committee again declined to certify him, but this time they expressly stated that the ground for denying admission was his refusal to answer the questions. The California Supreme Court denied review, and the case was right back at the U.S. Supreme Court. This time, Justice Harlan, who wrote the Dissent in Konigsberg I wrote the lead opinion and Konigsberg loses. First, Harlan tries to dispel the fact that the California Bar's second denial was inconsistent with the U.S. Supreme Court's opinion in Konigsberg I. To accomplish this he relies on the flimsy premise that the Bar might have asked additional questions if it had known its' decision would be overturned. It was lame logic. Harlan wrote:

> "In its earlier proceeding, the California Bar Committee may have found further investigation and questioning of petitioner unnecessary when, in its view, the applicant's prima facie case of qualifications had been sufficiently rebutted by evidence already in the record. **While, in its former opinion, this Court held that the State could not constitutionally so conclude, it did not undertake to preclude the state agency from asking any questions or from conducting any investigation that it might have thought necessary had it known that the basis of its then decision would be overturned."**

The logical weakness of Harlan's opinion is delineated exquisitely by Justice Black's Dissent which responds as follows:

> "When this case was here before, we reversed a judgment of the California Supreme Court barring the petitioner Konigsberg from the practice of law in that State on the ground that he failed to carry the burden of proving his good moral character . . . . In doing so, we held that there was "no evidence in the record" which could rationally justify such a conclusion. Upon remand, the Supreme Court of California referred the matter back to the Committee of State Bar Examiners for further hearings, at which time Konigsberg presented even more evidence of his good character.
>
> **. . .**
>
> **What the Committee did do upon remand was to repeat the identical questions with regard to Konigsberg's suspected association with Communists twenty years ago that it had asked and he had refused to answer at the first series of hearings. Konigsberg again refused to answer these questions, and the Committee again refused to certify him. . . .**
>
> **. . .**
>
> **This alone would be enough for me to vote to reverse the judgment."**

Having irrationally decided that consideration of the case was not precluded by Konigsberg I, Harlan rests his opinion on what is known as the "balancing" approach. Essentially, it stands for the notion that First Amendment freedoms must be sacrificed when outweighed by governmental interests. Remember, Konigsberg is asserting that his right to refuse to answer the questions is protected by the

First Amendment. This is the most interesting and important part of the opinion. Harlan states in the lead opinion as follows:

> "At the outset, we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are "absolutes," . . . Throughout its history, this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interest, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. . . .
> **. . .**
> As regards the questioning of public employees relative to Communist Party membership, it has already been held that the interest in not subjecting speech and association to the deterrence of subsequent disclosure is outweighed by the State's interest in ascertaining the fitness of the employee for the post he holds, and hence that such questioning does not infringe constitutional protections. . . . With respect to this same question of Communist Party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented."

Justice Black's Dissent, joined by the Chief Justice and Justice Douglas, quoted here at length is historic. He writes on behalf of the Dissenting power bloc:

> "Konigsberg's objection to answering questions as to whether he is or was a member of the Communist Party has, from the very beginning, been based upon the contention that the guarantees of free speech and association of the First Amendment as made controlling upon the States by the Fourteenth Amendment preclude California from denying him admission to its Bar for refusing to answer such questions. In this I think Konigsberg has been correct. . . . And yet it seems to me that this record shows, beyond any shadow of a doubt, that the reason Konigsberg **has been rejected is because the Committee suspects** that he was at one time a member of the Communist Party. I agree with the implication of the majority opinion that this is not an adequate ground to reject Konigsberg . . . .
>
> **The majority avoids the otherwise unavoidable necessity of reversing the judgment below . . . by simply refusing to look beyond the reason given by the Committee to justify Konigsberg's rejection. In this way, the majority reaches the question as to whether the Committee can constitutionally reject Konigsberg for refusing to answer questions . . . even though it could not constitutionally reject him if he did answer those questions and his answers happened to be affirmative.**

The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence. . . .

The Court attempts to justify its refusal to apply the plain mandate of the First Amendment in part by reference to the so-called "clear and present danger test" forcefully used by Mr. Justice Holmes and Mr. Justice Brandeis not to narrow, but to broaden, the then-prevailing interpretation of First Amendment freedoms. I think very little can be found in anything they ever said that would provide support for the "balancing test" presently in use. **Indeed, the idea of "balancing" away First Amendment freedoms appears to me to be wholly inconsistent with the view, strongly espoused by Justice Holmes and Brandeis, that the best test of truth is the power of thought to get itself accepted in the competition of the market**. . . . The "balancing test," on the other hand, rests upon the notion that some ideas are so dangerous that Government need not restrict itself to contrary arguments as a means of opposing them even when there is ample time to do so.

But I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it. This is nowhere more clearly indicated than by the sudden transformation of the "clear and present danger test" in *Dennis v. United States.* In that case, this Court accepted Judge Learned Hand's "restatement" of the "clear and present danger test":

> "In each case, (courts) must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

After the "clear and present danger test" was diluted and weakened by being recast in terms of this "balancing" formula, there seems to me to be much room to doubt that Justices Holmes and Brandeis would even have recognized their test. . . .

. . .

But I believe this Nation's security and tranquility can best be served by giving the First Amendment the same broad construction that all Bill of Rights guarantees deserve.

. . .

So the only issue presently before us is whether speech that must be well within protection of the Amendment should be given complete protection or whether it is entitled only to such protection as is consistent in the minds of a majority of this Court with whatever interest the Government may be asserting to justify its abridgement. **The Court, by stating unequivocally that there are no "absolutes" under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the "balancing test," and that, therefore, no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgement. In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed our entire structure of government rest. . . . Thus, the "balancing test" turns our "Government of the people, by the people and for the people" into a government over the people."**

I cannot believe that this Court would adhere to the "balancing test" to the limit of its logic. **Since that "test" denies that any speech, publication or petition has an "absolute" right to protection under the First Amendment, strict adherence to it would necessarily mean that there would only be a conditional right, not a complete right, for any American to express his views to his neighbors**. . . . In other words, not even a candidate for public office, high or low, would have an "absolute" right to print its opinion on public governmental affairs, and the American people would have no "absolute" right to hear such discussions. All of these rights would be dependent upon the accuracy of the scales upon which this Court weighs the respective interests of the Government and the people. It therefore seems to me that the Court's "absolute" statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views.

. . .

The Court seeks to bring this case under the authority of the street regulation cases, and to defend its use of the "balancing test" on the ground that California is attempting only to exercise its permissible power to regulate its Bar, and that any effect its action may have upon speech is purely "incidental." But I cannot agree that the questions asked Konigsberg with regard to his suspected membership in the Communist Party had nothing more than an "incidental" effect upon his freedom of speech and association. . . . I think the conclusion is inescapable that this case presents the question of the constitutionality of action by the State of California designed to control the content of speech. As such, it is a "direct," and not an "incidental," abridgement of speech. Indeed, if the characterization "incidental" were appropriate here, it would be difficult to imagine what would constitute a "direct" abridgement of speech. . . .

. . .

Indeed, if the State's only real interest was, as the majority maintains, in having good men for its Bar, how could it have rejected Konigsberg, who, undeniably and as this Court has already held, has provided overwhelming evidence of his good character? Our former decision, was that a man does not have to tell all about his political beliefs and associations in order to establish his good character and loyalty.

. . .

The interest in free association at stake here is not merely the personal interest of petitioner in being free from burdens that may be imposed upon him for his past beliefs and associations. It is the interest of all the people in having a society in which no one is intimidated with respect to his beliefs or associations. It seems plain to me that the inevitable effect of the majority's decision is to condone a practice that will have a substantial deterrent effect upon the associations entered into by anyone who may want to become a lawyer in California. **If every person who wants to be lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against,** including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment. And, in the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial. . . .

. . .

Thus, in my view, the majority has reached its decision here against the freedoms of the First Amendment by a fundamental misapplication of its own currently, but I hope only temporarily, prevailing "balancing" test. The interest of the Committee in satisfying its curiosity with respect to Konigsberg's "possible" membership in the Communist Party two decades ago has been inflated out of all proportion to its real value . . . . This, of course, is an

ever-present danger of the "balancing test" for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. . . . But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times. . . .

. . .

In my judgment, this case must take its place in the ever-lengthening line of cases in which individual liberty to think, speak, write, associate and petition is being abridged in a manner precisely contrary to the explicit commands of the First Amendment. . . .

. . .

Nothing in this record shows that Konigsberg has ever been guilty of any conduct that threatens our safety. **Quite the contrary, the record indicates that we are fortunate to have men like him in this country, for it shows that Konigsberg is a man of firm convictions who has stood up and supported this country's freedom in peach and war.** The writing that the record shows he has published constitute vehement protests against the idea of overthrowing this Government by force. No witness could be found throughout the long years of this inquisition who could say, or even who would say, that Konigsberg has ever raised his voice or his hand against his country. **He is, therefore, but another victim of prevailing fashion of destroying men for the views it is suspected they might entertain."** [186]

And that is the Konigsberg line of cases which established that the refusal to answer an improper State Bar admission question, may in and of itself constitute grounds for denial of the application. The very same day on which the decision in Konigsberg II was handed down, April 24, 1961, the Court also rendered its' decision in the case **In re Anastaplo**, another Bar admissions case.

IN RE ANASTAPLO, 366 U.S. 82 (1961)

Like so many of the Bar admission cases, the Applicant Anastaplo was the child of parents who had immigrated to this country. In this particular instance, they immigrated from Greece prior to his birth.

The Anastaplo case was virtually identical to the *Konigsberg* case. Anastaplo refused to answer the inquiry into whether he was ever a member of the Communist Party. It was again a slim 5-4 decision, with Justice Harlan unsurpisingly writing the lead opinion, ruling against Anastaplo, and Justice Black writing a stinging Dissent, joined by Justices Douglas, Brennan and Chief Justice Warren. There was one major distinction however, from the *Konigsberg* case. Anastaplo contended he was not adequately warned by the Bar Committee of the consequences for his refusal to answer the question. His position was predicated on the fact that one of the Committee members made a statement that Illinois had no *"per se"* rule of exclusion, and that a refusal to answer would not automatically exclude admission. Justice Harlan determines the issue to be insubstantial on the ground that due process does not demand one be warned of the sanction applied if the law is violated.

The Great Justice Black's Dissent is similar to his Dissent in Konigsberg II. From a moral perspective, it differs in that he demonstrates the consequences of allowing the refusal to answer questions to constitute grounds for denial. In many regards, the words he quotes about Anastaplo himself, rather than the legal issues, are the most interesting aspects of his opinion. Other than his refusal to answer the questions related to whether he was a member of the Communist Party, Anastaplo's character was unchallenged by the Bar Committee. Quite simply put, his character was impeccable. After intensive investigation, not one person could be found who would say anything even faintly derogatory. He served in the Air Force during World War II, flying as a navigator in every major theater of the military operations of the war and received an honorable discharge. The Bar after interviewing individuals in his home town could not find even one statement about his life or conduct that casted doubt upon his fitness for admission. During all Bar proceedings he conducted himself with complete dignity, without exception. This is more than can be said for the Bar Examiners themselves, as will be demonstrated. The problems for Anastaplo during the admissions process began in an incredible fashion. They were due to the answer he gave to the following improper application question:

> "State what you consider to be the principles underlying (a) the Constitution of the United States."

Anastaplo answered as follows:

> "One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness . . . **And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government."**

It was the last sentence the Committee wanted to question him about. During the discussions, he stood his ground that the people have a "right of revolution." At that juncture, a Subcommittee member interrupted with the question:

> "Are you a member of any organization that is listed on the Attorney General's list, to your knowledge?"

It was followed up by the question:

> "Are you a member of the Communist Party?"

Anastaplo challenged the validity of the questions, the Committee refused to certify his application, and another Hearing was set. What followed exposed the Bar admissions process at its' absolute worst. During the series of hearings that followed, the rift between Anastaplo and the Committee grew wider. The Committee asked questions regarding his "possible" association with scores of organizations, including the Ku Klux Klan, Fascists, every organization on the Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point, at least two members insisted that he tell the Committee whether he believed in a Supreme Being. At the final session, his closing remarks to the Committee were as follows:

> **"It is time now to close. Differences between us remain. . . . you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that contribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as conscience permits.** To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice, that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain.
>
> . . .
>
> I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this State. And I suggest that this recommendation be made retroactive to November 10, 1950 **when a young Air Force veteran first was so foolish as to continue to serve his country, by daring to defend against a committee on character and fitness the teaching of the Declaration of Independence on the right of revolution."**

Justice Black notes the sincerity and devotion of Anastaplo by citing the following remarks he made:

> **"I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government. The bar, when it exercises self-control, is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government**. . . . The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people." [187]

At no time did Anastaplo ever even remotely express a belief that this country was an oppressive one in which the "right of revolution" delineated in the Declaration of Independence should be exercised. Justice Black notes that quite to the contrary, the entire course of his life was one of

devotion to his country. Black stresses that this case illustrates the consequences to the Bar, of not affording the full protections of the First Amendment.

Anastaplo was a man victimized by the traditional State Bar witch-hunt. Subjected to intense scrutiny which ultimately uncovered absolutely nothing incriminatory, he was denied admission solely on the ground that he refused to answer improper questions. Those questions included groundless inquiries regarding his membership in countless organizations and the consistency of his religious beliefs with an attorney's duty to take an oath of office.

The Bar's interest in accomplishing the fortification of political power through its' membership can be demonstrated further by considering the case of *Lathrop v. Donohue*, 367 U.S. 820 (1961), a case while admittedly not directly related to the admissions process, provides insight into what the Bar is all about.

LATHROP v. DONOHUE, 367 U.S. 820 (1961)

This case demonstrates how uncomfortable the U.S. Supreme Court is in dealing with issues pertaining to the State Bar's power to regulate the legal profession. The end result is basically a U.S. Supreme Court opinion that says absolutely nothing. As Justice Hugo Black, the staunchest supporter of the First Amendment states with an amusing smart-alecky nature in the very first sentence of his dissent:

> "I do not believe that either the bench, the bar, or the litigants will know what has been decided in this case--certainly I do not."

He then goes on to say:

> "Two members of the Court, saying that "the constitutional issue is inescapably before us" vote to affirm the holding of the Wisconsin Supreme Court that a State can, without violating the Federal Constitution, compel lawyers, over their protest, to pay dues to be used in part for the support of legislation and causes they detest. Another member, apparently agreeing that the constitutional question is properly here, votes to affirm the holding of the Wisconsin Supreme Court because he believes that a State can constitutionally require a lawyer to pay a fee to its' "designee" as a condition to granting him the "special privilege" of practicing law, even though that "designee", over the lawyer's protest, uses part of the fee to support causes the lawyer detests. Two other members of the Court vote to reverse the judgment of the Wisconsin court on the ground that the constitutional question is properly here, and the powers conferred on the Wisconsin State Bar by the laws of that State violate the First and Fourteenth Amendments. Finally, four members of the Court vote to affirm on the ground that the constitutional question is actually not here for decision at all. . . . If ever there were two cases that should be set over for reargument in order for the Court to decide--or least make an orderly attempt to decide the basic constitutional question involved in both of them, it is this case and the companion case of *International Association of Machinists v. Street*."

Now let's look at the case itself. The case dealt with the requirement promulgated by the Wisconsin Supreme Court that attorneys in Wisconsin be a member of the integrated State Bar. The Bar then required its' members to pay annual dues of $ 15. The appellant, a Wisconsin lawyer instituted an action for refund of the $ 15 dues on the grounds they were paid under protest. When paying the $ 15 he attached a letter that stated as follows:

> "**I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities** . . . . A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature."

He alleged further that the State Bar:

> "used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by plaintiff, all contrary to plaintiff's convictions and beliefs"

The core of his argument was that he could not be constitutionally compelled to give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its funds to influence legislation. Stated simply, the Bar's policy was, if you want to practice law, you must provide financial support to our political causes. It is important to note when reviewing this case, that the attorney instituted his action in 1959. The Wisconsin State Bar was created in 1957, only two years earlier. Prior to that time, although an individual was required to be licensed to practice law, they were not required to join the State Bar which was merely a voluntary association. The process of requiring lawyer professionals to be a member of an organization that goes beyond mere professional licensing was known as “integrating” the Bar. The legitimacy of integrating the Bar was a highly controversial issue during this period. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed a statute providing:

> "There shall be an association to be known as the "State Bar of Wisconsin" composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin."

The State Supreme Court twice refused to order integration, but finally relented thirteen years later in 1956. That resulted in the creation of the Wisconsin Bar on January 1, 1957. The purposes of the organization were stated in Rule 1, Par. 2 and included the following that expressly confirmed the monopolistic, anticompetitive mentality.

> "to safeguard the proper professional interests of the members of the bar"

Note the lack of emphasis on safeguarding the public’s interest, but rather the concentration on “professional interests.” The Appellant attacked the power of the Bar on the ground that its' legislative activities gave it the character of a political party. He was astutely noting that the Bar's activities relegated it to a self-serving entity, rather than a licensing and disciplinary authority designed to promote the public interest. The U.S. Supreme Court plurality affirmed only the State's right to require lawyers to become members of an integrated Bar and to pay reasonable annual dues as members of that Bar. It did not decide the core issue of the case, which was whether those lawyers may be constitutionally compelled to contribute financial support to activities they oppose.

As Justice Black correctly noted, it's kind of a ridiculous opinion. The issue not decided was the primary reason the case was there in the first place. The case was relegated to addressing the legitimacy of an integrated Bar which was tangential to the appellant's assertion that he was being unconstitutionally required to financially support political activities. The facts left no doubt that the Bar was attempting to influence legislation on behalf of its' members and was designed to promote their professional interests. It was not functioning as a State agency to ensure only that competent individuals perform legal services. The case also briefly addressed the economic protectionist Bar issue of UPL (Unauthorized Practice of Law). Footnote 12 of the lead opinion states:

> "Revenues from integration enabled the State Bar to employ a lawyer whose principal task is the investigation of complaints of unauthorized practice and the effort to achieve its discontinuance. A number of legal action to prevent unauthorized practice have been instituted . . . **The Committee on Unauthorized Practice has also worked with the Committee on Interprofessional and Business Relations in conferring with other professional groups to establish demarcation lines between their activities and those of the bar. Thus an agreement was negotiated with the Association of Certified Public Accountants, and a joint committee provided to police it."**

Take note of what is occurring here. A Wisconsin lawyer must contribute financial support to the political activities of a Bar that has as its' purpose "to safeguard the proper professional interests of the members of the bar." Those proper “professional interests” are comprised of an aggressive UPL police enforcement policy, which itself was largely dependent on the “Committee on Interprofessional and Business Relations.”

Justice Douglas indicates in his stinging dissent that the Bar had essentially forced its' lawyers to join a guild. If the State can compel lawyers to join a guild, then why not doctors, dentists, nurses, insurance agents and certified public accountants. The same criteria that the plurality uses to support the legitimacy of the integrated bar would be applicable to all other professions. Douglas recognizes the nexus between an integrated bar, UPL and monopolistic, anticompetitive policy. He states:

> **"It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." . . . In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession.** Thus, the Bar has compiled and published a schedule of recommended minimum fees. . . . Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within "the proper scope of the practice of law."

One of Douglas' most interesting footnotes depicts the economic danger of having a mandatory agency that adopts a policy of furthering the economic interests of its' members in favor of the public interests. He includes a commentary published in a newspaper in England, pertaining to the regimented Bar in England in the following Footnote (the term “solicitor” basically means attorney in England):

> **"The immense groups controlling financial operations are becoming more and more interlocked, and have an increasing tendency to cover up each other's errors**. . . . The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business; and if dishonesty is alleged, they all to often refuse "to act" . . . . Slowly, dangerously, and without the public fully realizing what is happening, a nation of great power . . . is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension of power, but who, in fact, are wholly ruthless in a persistent search for power."

On the other end of the spectrum sharply contrasting with the compelling Dissents of Justices Black and Douglas, is a stinging concurrence written by Justice Harlan that is Pro State Bar down the line. Harlan rather than just affirming the constitutionality of the integrated Bar, would give the stamp of approval to exacting dues for political causes. To properly appreciate the weakness of Harlan's logic it should be compared with Justice Black's position, as their diametrically opposed opinions are written directly to each other. They both only agree that the constitutionality of the dues issue should have been addressed. Harlan has no doubt about Wisconsin's right to use the dues in furtherance of political purposes. He supports this conclusion on the basis that application of the First Amendment freedom of speech is predicated on a balancing approach. The balancing approach, in Harlan's opinion dictates that the interests of the state be balanced against any degree to which appellant's freedom of speech is inhibited by the requirement that he give financial support to causes he does not espouse. Black does not support the balancing approach.

I quote applicable portions of Harlan's concurring opinion and Black's Dissent by presenting them in the form of a conversation with each other. I close with a comment in Douglas' opinion. This

I believe will best enable the reader to ascertain who makes logical sense, and who is just blowing hot air.

HARLAN: I agree with my Brother BLACK that the Constitutional issue is inescapably before us. **. . .** I think that there can be no doubt about Wisconsin's right to use appellant's dues in furtherance of any of the purposes . . . Orderly analysis requires that there be considered, first, the respects in which it may be thought that the use of a member's dues for causes he is against impinges on his right of free speech, and, second, the nature of the state interest offered to justify such use of the dues extracted from him. . . .

BLACK: **The "balancing" argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of "self-preservation." The interest of the State . . . is magnified to the point where it assumes overpowering proportions, and appears to become almost as necessary a part of the fabric of our society as the need for "self-preservation." On the other side of the "scales," the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely "chimerical nature."** As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales, and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.

HARLAN: As I understand things, it is said that the operation of the Integrated Bar tends (1) to reduce a dissident member's "economic capacity" to espouse causes in which he believes; (2) to further governmental "establishment" of political views; (3) to threaten development of a "guild system" of closed, self-regulating professions and businesses; (4) to "drown out" the voice of dissent by requiring all members of the Bar to lend financial support to the views of the majority; and (5) to interfere with freedom of belief by causing "compelled affirmation" of majority-held views. With deference, I am bound to say that, in my view, all of these arguments border on the chimerical.

BLACK: I cannot agree that a contention arising from the abridgement of First Amendment freedoms which results from a compelled support of detested views can properly be characterized as of a "chimerical nature," . . . . Quite the contrary, I can think of few plainer, more direct abridgements of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes they are against. . . .

HARLAN: . . . I do not think it can be said with any assurance that being required to contribute to the dispersion of views one opposes has a substantial limiting effect on one's right to speak and be heard.

BLACK: At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes, and wholeheartedly fight whatever they are against . . .

HARLAN: In this instance, it can hardly be doubted that it was constitutionally permissible for Wisconsin to regard the functions of an Integrated Bar as sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise from the operations of the organization.

BLACK: I do not believe that the practice of law is a "privilege" which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual . . . What I said in the *Cohen* case is, in my judgment, equally applicable here:

> "One of the great purposes underlying grant of those freedoms was to give independence to those who must discharge important public responsibilities. . . . If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wield governmental power at the moment. Wherever that has happened in the world, the lawyer, . . . has ceased to perform the highest duty of his calling, and has lost the affection and even the respect of the people."

DOUGLAS: Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. . . But when those laws are sustained, we require them to be "narrowly drawn" so as to be confined to the precise evil within the competence of the legislature. . . . **Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. . . . we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. . . . Those brigades are not compatible with the First Amendment. . . . the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.** [188]

Another landmark case that warrants serious recognition, even though it does not bare directly on the subject of State Bar admission is *NAACP v. BUTTON*. It deals with the issue of UPL and once again demonstrates the irrational nature of the State Bar mindset and its' organizational "group" goals.

NAACP v. BUTTON, 371 U.S. 415 (1963)

With a heightened sense of arrogance that is admittedly normally characteristic only of members of the Judiciary, I assert that in my own esteemed and absolutely correct opinion that *NAACP v. BUTTON* is the second best opinion ever written in the history of the United States Supreme Court (the best is *Ex Parte Garland*). Sadly, it has been completely misinterpreted and its' intent evaded by State Supreme Courts. As a result, the Court's brilliant opinion has never fulfilled its' expectations. Concededly, misinterpretation and evasion of the opinion by State Supreme Courts is not surprising since the opinion when properly read and complied with would divest State Bars of their ability to evade the First Amendment. Here are the facts.

The case has its' roots in *Brown v. Board of Education*, 347 U.S. 483 which held in 1954 that segregation by race in public schools violated the Equal Protection Clause of the Fourteenth Amendment. The losing litigant in *Brown* was the State of Virginia. In an attempt to frustrate implementation of *Brown*, while still giving the appearance of compliance, Virginia enacted five legislative bills as part of a "general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." Those are the words of Judge Soper writing for the court in *NAACP v. Patty*, 159 F. Supp. 503, 515 as cited by Justice Douglas in the *Button* case. (NOTE : the *Button* case was originally delineated as *Patty* in the lower court). The amendments were enacted two years after the *Brown* decision, in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina and Tennessee passed similar laws following the *Brown* opinion. The link between utilizing UPL as a State Bar mechanism to promote racial prejudice was established.

The issue in *Button* was the constitutionality of Chapter 33 of the Virginia Acts of Assembly, 1956 Extra Session on the ground that the statute was in violation of the Fourteenth Amendment. That statute made it an offense for organizations falling within specified criteria, to solicit business for an attorney. The NAACP at this time was devoting much of its funds and energies to an extensive program of assisting litigation on behalf of its declared purposes. They financed cases when certain litigants retained an NAACP attorney to represent them. The Conference maintained a legal staff of 15 attorneys, each required to agree with the policies of the NAACP pertaining to professional services. The staff lawyer received per diem compensation from the NAACP and was not allowed to accept compensation from the litigant. The client was free to withdraw at any time. Essentially, the NAACP would identify cases that furthered their goals of equality and then provided free legal services to the litigant through their lawyers. Virginia having failed in *Brown* to subvert legal activities of the NAACP, was now trying to “back door” their neutralization policy by disallowing the NAACP’s solicitation of cases. Virginia's side of the case can be summed up by their assertion that the NAACP was "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability."

The U.S. Supreme Court in an opinion written by Justice Brennan held that the activities of the NAACP were protected by the First Amendment, which Virginia could not prohibit under its' power to regulate the legal profession. The Court concluded that under the statute, an attorney who advises another person that their legal rights have been infringed and refers that person to an attorney has committed a crime. There thus adheres in the statute the gravest danger of smothering discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. The Court determined that the Virginia statute potentially prohibited every cooperative activity that would make advocacy of litigation meaningful. Virginia contended it had an interest in regulation of the legal profession and that the NAACP's activities fell within the purview of state regulation. The U.S. Supreme Court responded that a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. It determined that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.

The NAACP claimed that the statute infringed on their right to have members and lawyers associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed rights. Virginia opposed their contention on the ground that "solicitation" of cases was outside the freedom protected by the First Amendment. The Court determined that a State can not foreclose constitutional rights by mere labels. The First Amendment protects not only abstract discussion, but advocacy against governmental intrusion. Litigation is a means for achieving lawful objectives of equality of treatment. The Court interestingly notes:

> "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

In response to Virginia's attempt to falsely categorize a First Amendment violation as the regulation of professional conduct (the standard defense State Bar's assert with respect to UPL) the Court notes:

> "Thus, it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."

Justice Harlan the stalwart proponent of State Bar regulatory power, even when it opposed American freedoms wrote a stinging Dissent. His initial attack is on the NAACP. He delineates the degree of control that the NAACP holds over cases that its' attorneys litigate. He determines that the organization rather than the attorneys, control the timing of suits, form of pleading and the type of relief to be requested. Essentially, it is his position that as a result of the NAACP's activities the normal incidents of the attorney-client relationship are lost. Consequently, he concludes that the NAACP's solicitation activities are within the purview of State regulation. Harlan then addresses the argument adopted by the Court that such regulation infringes on the First Amendment. His attack on First Amendment protections relies on the premise that the activities consist not only of speech, but also conduct. He submits it is "speech plus." This is the heart of the State Bar's justification for UPL enforcement. As a result, it is his position the State may restrict those undertaking to represent others in legal proceedings, to properly qualified practitioners and also determine that an association does not have standing to litigate the interests of its members.

Under Harlan's theory, the key issue becomes not whether free speech has been infringed, but instead whether the particular regulation of conduct has a reasonable relation to the furtherance of a proper state interest. The majority determined an infringement on speech must serve a compelling state interest. Harlan asserts it must meet only a legitimate state interest. By changing the categorization of activity from speech to conduct, the standard to be met has been reduced to one more lax, than that of comparable First Amendment infringements. I am forced to concede the deceptive brilliance of the legal manipulation. Once the standard is reduced from a compelling interest to merely a legitimate state interest, Harlan demonstrates how the regulation of conduct furthers a legitimate state interest. He appears to compare the NAACP's activities with being just beyond that of ambulance chasing lawyers stating:

> "But a State's felt need for regulation of professional conduct may reasonably extend beyond mere "ambulance chasing." [189]

Then Harlan makes a colossal blunder. He compares the ***Button*** case with the case of ***In re Brotherhood of Railroad Trainmen***, 13 Ill.2d 391, 150 N.E. 2d 163. He notes that the NAACP's practices are similar to those of the ***Brotherhood*** which was also a case involving UPL. It involved a

labor union's policy of advising injured members about seeking legal assistance. Harlan confidently relies on the reasoning of the State Court opinion in that case that condemned the union's practices. One slight problem though. Approximately, 15 months after the ***Button*** case, Harlan's reasoning will be demolished when the U.S. Supreme Court validates labor union practices with respect to alleged UPL by vacating the Virginia Supreme Court's decree in ***Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar***, 377 U.S. 1 (1964). Harlan also Dissents in that case.

In considering ***Button***, the reader is asked to ponder the following questions that are conclusive on the UPL issue. Consider your own personal experiences and interaction with people both from a social and business perspective. Consider most importantly your general "feel" of what is right and wrong.

1. When a person gives verbal or written assistance, including legal help to the best of their ability, is it more an issue of speech or conduct?

2. Should a State's asserted power to curtail the provision of verbal or written assistance be required to meet a strict standard?

3. If you are personally ever the victim of some type of improper state action, and somebody you know has the means to give you verbal and written advice, do you want them to be under the threat of imprisonment should they provide that advice to you?

The key question is #2. I believe virtually everyone, including those who have virtually no knowledge of the law would answer "yes" to question #2. If question #2 is answered yes, then #1 is automatically answered as speech rather than conduct. If question #2 however is answered as "no," you must be willing to accept that the answer to question #3 is "yes."

WILLNER V. COMMITTEE ON CHARACTER AND FITNESS, 373 U.S. 96 (1963)

Sometimes admission proceedings can take a lengthy period of time. *Willner* presents the case of a man trying to gain admission to the New York Bar for the incredible period of 25 years.

He passed the New York Bar exam in 1936. It was alleged that in 1937 he was shown a letter by a member of the Bar, that was from a New York attorney and which contained adverse statements about him. It was further alleged that he was promised a confrontation with that attorney by a member of the Character Committee. The promise however, was broken by the Committee member. In 1938 after several Hearings, the Committee refused to certify him. In 1943 he applied for an Order directing the Committee to review its 1938 determination which was denied. In 1948 he received permission to file a new application that was denied in 1950. In 1951, he became a Certified Public Accountant and again applied for an Order regarding his Bar application. Specifically, he requested that the Committee to furnish him with a statement of reasons for its refusal to certify him. His request was denied. In 1954, he filed another application that was denied. In 1960, he filed his fifth application that was denied without opinion. The New York Court of Appeals granted leave to appeal and after oral argument affirmed without opinion. The U.S. Supreme Court then granted certiorari.

Willner's claim was that he was denied the constitutional right to confront his accusers and that in spite of repeated attempts he could not be sure of the Committee's reasons for denying his application. The lead opinion of the U.S. Supreme Court by Justices Black and Douglas ruled in his favor. Concurring opinions were written by Justices Goldberg, Brennan and Stewart, and a Dissenting opinion by of course, Justice Harlan joined by Justice Clark. It is quite clear the Bar admission cases were close calls with a sharply divided Court. Harlan and Black always the leaders on opposing sides. Justices Black and Douglas' once again "conclusively" establish that the ability to engage in the practice of law is a "Right," rather than a "Privilege." Once again, they cite the 19th century case of *Ex parte Garland* in support. It was 1963 and *Garland* was still relied on 97 years after it had been rendered. The opinion states:

> "The issue presented here is justiciable. "A claim of present right to admission to the bar of a state and a denial of that right is a controversy." *In re Summers*, 325 U.S. 561. Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law.
>
> . . .
>
> As the Court said in *Ex parte Garland*, 4 Wall. 333, 379, the right is not "a matter of grace and favor." [190]

The Court concludes that an Applicant has a right to procedural due process including a hearing and being informed of the grounds for rejection. Even Harlan's Dissent does not appear to contest that point. Instead, he dissents on the ground that the case does not present a substantial federal question due to the lengthy period of time involved, the messiness of the opaque record and the number of times it was reviewed by the New York Courts.

Some facts pertaining to Mr. Willner are interesting. The primary nature of the complaints against him arose from two lawyers, Wieder and Dempsey. Wieder alleged that Willner was discharged from his office for unsatisfactory performance during a clerkship. Dempsey's complaint related to civil litigation in which Willner was purportedly involved in fraud pertaining to accounting services he performed.

Willner initially stated in his application that he had not been "connected" with any law offices, although he later confirmed he was employed by Wieder for a short time. The meaning of the term "connected" is obviously ambiguous. He also stated he served "no clerkship," although he subsequently informed the Committee of filing a certificate of clerkship with the Court of Appeals in

Albany. This issue may have been attributed to the fact that since he had not completed the clerkship, he properly believed the answer should be "no clerkship." Essentially to assert that he had done a "clerkship" when it had not been completed would be misleading. He also failed to disclose an annulment suit brought against him by his 16 year old wife, later stating that he omitted it because "Some people consider it a heinous offense." Assuming the marriage was not illegal, (the Court's opinion is unclear on the issue), the issue while admittedly "immoral" in nature, under contemporary standards is unrelated to the ability to practice law.

In considering the issue of nondisclosure, if the question is too personal in nature, then the inquiry itself must logically be considered immoral, to an extent exceeding the Applicant's failure to disclose. Willner's failure to disclose, was obviously attributable to embarrassment more than anything else. This author believes the legal profession should not unconstitutionally place Applicants in a position of having to disclose embarrassing personal facts that are immaterial to the practice of law. Concededly though, having a sixteen year old wife does sound rather bad.

He also failed to disclose six other lawsuits or judgments against him. The Court's opinion does not address the type of lawsuits, or the amount of time lapsed between them and his application. If they were minor in nature, simply dismissed, or occurred more than a few years prior to his application, the failure to disclose such could be a matter of inadvertence, immaterial or innocent error. To the extent, the Bar's questionnaire inquires about lawsuits of a minor nature occurring several years prior to the application, the Bar places an unreasonable burden on the Applicant. This assumes one even believes civil lawsuits should be disclosed, which this author does not. The cumbersome requirement of providing immaterial, dated information reflects more poorly on the moral character of Bar Examiners, than the Applicant. It is difficult to surmise any relevancy to requiring disclosure of civil lawsuits before one becomes a lawyer.

Willner's case is particularly interesting due to the variety of issues. While the U.S. Supreme Court deals only with the due process and procedural issues, ruling in his favor, the character issues extend farther. Unfortunately, they are not discussed at length in the opinion but just referred to in the footnotes. Here you have a man at least in his fifties being required to disclose all aspects of his entire life. While the issues are numerous, for the most part with the exception of the 16-year old wife, and the lawsuit possibly involving fraud, the others are irrefutably immaterial in nature. As pertains to the 16-year old wife, assuming it was not an illegal marriage, and notwithstanding that it sounds bad, it's an issue that is simply not related to the ability to practice law. As pertains to the suit purportedly involving fraud, the Court's decision does not disclose the nature of the final judgment. It cannot be determined from reading the opinion whether he really committed fraud or not. Accusations are meaningless unless proven.

On the other side of the coin, you have a Bar Committee delving into the most personal aspects of a man's life, magnifying each shortcoming beyond its importance, and then not even providing the constitutional right of confrontation or a proper hearing. People have pasts. It is unlikely that most people in their fifties do not have some aspect of their life that reflects negatively upon them.

Not everyone's an Anastaplo. And he didn't get into the Bar either.

IN RE STOLAR, 401 U.S. 23 (1971)

In 1971, the Bar admissions process was on the verge of becoming constitutionalized. Three cases were decided by the U.S. Supreme Court on the exact same day February 23, 1971. Two ruled in favor of the Applicants. They were narrow 5-4 decisions, once again demonstrating the difficulty and uncertainty the Court had in dealing with the issue. The third case, **Law Students Civil Rights Research Council v. Wadmond**, 401 U.S. 154 (1971) substantially diluted the impact of the Applicant's victories in the first two cases. After these three cases, the only thing one could conclusively say, was that the Court was having great difficulty with the issue.

The *Stolar* case involved a New York attorney who applied for admission to the Ohio Bar. As part of his application, he made available all information given on his New York application. He refused to answer three questions on the Ohio application that inquired about organizations he was a member of, on the ground the questions infringed upon his First and Fifth Amendment rights. As part of his New York application, Stolar was required to answer the following question, which I present simply to show the ridiculous nature of the application process (his answers in italics):

> 18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully.
>
> *I was a Cub Scout and Boy Scout and Explorer Scout during elementary and high school.*
>
> *I also participated fully in my Temple's religious education programs until I went to college.*

On the Ohio application, Stolar refused to answer the following questions:

> 7. List the names and addresses of all clubs, societies or organizations of which you have been a member since registering as a law student.
>
> 13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member.
>
> 12. State whether you have been, or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . .

The lead opinion was written by Justice Black, joined unsurprisingly by Justices Douglas, Brennan and Marshall. Chief Justice Warren previously part of Justice Black's power bloc had now been replaced by Chief Justice Burger who became part of the Harlan faction. Justice Blackmun, now on the Court was a staunch conservative, although would later become one of the more liberal members after his opinion in *Roe v. Wade*. Blackmun joined Justice Harlan's power bloc along with Justice White. If this case had been heard later in Blackmun's career, his opinion probably would have been substantially different.

It was Justice Stewart however, who was the swing vote. He merely concurred in the judgment where the two Applicants won and wrote the lead opinion in the case that the Applicants lost. The issues addressed were similar to Konigsberg I, II and Anastaplo. Basically, it was four against four, with Stewart only concurring in the result not the reasoning of the lead opinion where the Applicants won. Once again, just like in the *Konigsberg* and *Anastaplo* cases, it was absolutely nothing short of a

mess. Justice Black's lead opinion in <u>*Stolar*</u> first notes that the issues are related in large part to the McCarthy era. He writes as follows:

> "This is the second of two cases involving the refusal of States to admit applicants to practice law because they declined to answer questions relating to their beliefs about government and their affiliations with organizations suspected of advocating the overthrow of government by force. **These cases, which concern inquisitions about loyalty and government overthrow, are relics of a turbulent period known as the "McCarthy era," which drew its name from Senator Joseph McCarthy from Wisconsin. We have just referred in our opinion in *Baird v. State Bar of Arizona,* ante, p.1, to the confusion and uncertainty created by past cases in this constitutional field**. The central question in all of them has been the same, whether involving lawyers, doctors, marine workers, or State or Federal Government employees, namely : to what extent does the First or Fifth Amendment or other constitutional provision protect persons against governmental intrusion and invasion into private beliefs and views that have not ripened into any punishable conduct ? . . . Here, we hold that Stolar's refusal to answer certain questions asked him by the Ohio Bar Committee were also protected by the First Amendment."

The Court's opinion notes that in his New York application, Stolar was required to provide the following information, which in and of itself I find to be somewhat incredible, and indicative of the Bar's overly inquisitive and prejudicial mindset:

1. the names, addresses and occupations of his parents
2. the names and addresses of his elementary school and high school principal

Justice Black concludes the opinion as follows, ruling in Stolar's favor:

> "The record shows a young man who, from boyhood up, had no adverse marks except for two speeding convictions. He answered numerous prying questions about personal affairs that could hardly have been necessary for a State interested only in whether he would make an honest lawyer faithful to his clients. . . . The State points to not one overt act on Stolar's part that even suggests a possible reason for denying his application. . . . The judgment of the Ohio Supreme Court is reversed. . . ."

Justice Blackmun's Dissent, joined by Chief Justice Burger, Justices Harlan and White is predicated not on the nature of the questions, which he virtually concedes to be unconstitutional, but rather on Stolar's refusal to answer. The obvious dilemma this creates is that under Blackmun's reasoning it would be almost impossible to challenge unconstitutional Bar admission questions, unless the answer resulted in denial of admission. Further, the answers to unconstitutional questions could then be used surreptitiously by the Bar to deny admission ostensibly on other grounds.

For instance, let us consider two fictitious Applicants with misdemeanor convictions, both of whom disclose such on their application. One discloses that he has never been a member of any organization, and the other discloses that he has been a member of some organization the Bar does not like. By allowing the Bar to ask the organizational question, it has the ability to deny the second Applicant admission based on the misdemeanor conviction, while granting the first Applicant admission notwithstanding the misdemeanor conviction. The ostensible ground for denial of the one Applicant would be the conviction, but the true reason would be his answer to the organization question. This is just the type of diabolical scheme the Bar loves. It goes all the way back to the NCBE's inception in

1931, and in fact even the eighteenth century when colonial lawyers were simply admitted based on who they knew. The Bar's concept is to use the Applicant's answer to an unconstitutional question as a means to determine admission ostensibly on other grounds. Justice Blackmun's Dissent states:

> "This case . . . presents another instance of a well educated . . . and obviously able young person who seeks admission to the Bar, but, to an extent, at least, upon his own terms. His case is made the more acute and appealing because he already has been admitted to practice in the State of New York. . . . The decisions in *Konigsberg v. State Bar* 366 U.S. 36 (1961) and *In re Anastaplo* 366 U.S. 82 (1961) are again challenged."

Justice Harlan, in addition to joining Blackmun's Dissent, writes his own opinion that states as follows:

> "My Brother BLACK's opinion announcing the judgments of the Court in Baird and in the present case, and his dissenting opinion in the Wadmond case, could easily leave the impression that the three States involved are denying Bar admission to professionally qualified candidates solely by reason of their membership in so-called subversive organizations, irrespective of whether that membership is born of a purely philosophical cast of mind . . . or that these States are at least trying to discourage prospective Bar candidates from joining such organizations. In the latter respect, my Brother MARSHALL's opinion . . . seems to me to lend itself to a similar interpretation.
> . . .
> They show no more than a refusal to certify candidates who deliberately, albeit in good faith, refuse to assist the Bar admission authorities in their "fitness" investigation by declining fully to answer the questionnaires. . . .
> . . .
> . . . Knowing something of the great importance which the New York Bar attaches to the independence of the individual lawyer, I have little doubt but that the candidates involved in *Wadmond* will promptly gain admission to the Bar if they straightforwardly answer the inquiries put to them without further ado. And I should be greatly surprised if the same were not true as to Mrs. Baird and Mr. Stolar in Arizona and Ohio. **But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene."** [191]

Justice Harlan's last sentence above was unbelievable to me!! He was softening. He was forthrightly doing nothing less than telling the State Bars that the individuals in these cases better be admitted to the practice of law. I just have to quote that last sentence again:

> **"But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene."**

That time has come.

BAIRD V. STATE BAR OF ARIZONA, 401 U.S. 1 (1971)

Five-to-four again. Perhaps it should be more accurately stated as four against four, with Justice Stewart concurring separately, thereby resulting in a five to four plurality. Black, Brennan, Marshall and Douglas, against Harlan, White, Blackmun and Burger. Same type of issue as *Konigsberg*, *Anastaplo*, *Schware*, and *Stolar*.

The facts are once again particularly interesting. This time we are dealing with a female Bar applicant. Mrs. Baird was a graduate of Stanford Law School without a single mark against her moral character. She refused to answer the question inquiring whether she had ever been a member of the Communist Party or any organization that advocates overthrow of the United States by force or violence. Her refusal was predicated on the ground that the question would require her to make a guess as to whether any organization to which she ever belonged advocated such. Essentially, she asserted that since in Arizona at the time, answering a Bar Committee's questions falsely constituted perjury, the question required her to run the risk of a perjury conviction, if her lack of knowledge proved incorrect. She did answer the question requiring her to provide a list of the organizations that she had been a member of since age 16. That list was comprised of the following. Church Choir, Girl Scouts, Girls Athletic Association, Young Republicans, Young Democrats, Stanford Law Association and Law School Civil Rights Research Council. The difficulties which the U.S. Supreme Court faced in dealing with this issue over the years, is summed up in Justice Black's lead opinion which states:

> **"Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views** on Communism and revolution. **This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy** from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California, and this Court reversed. . . . The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-4 decision. . . . An applicant named Rudolph Schware was denied admission in New Mexico, and this Court reversed, with five Justices agreeing on one opinion, three Justices on another opinion, and one not participating. . . . In another case, an applicant named George Anastaplo was denied admission in Illinois on grounds similar to those involved in Konigsberg and Schware, and the denial was affirmed by a 5-4 margin. . . . With sharp divisions in this Court, our docket and those of the Courts of Appeals have been filled for years with litigation involving inquisitions about beliefs and associations and refusals to let people practice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas."
>
> . . .
>
> In Arizona, it is perjury to answer the bar committee's questions falsely, and perjury is punishable as a felony. . . . In effect, this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged "advocates overthrow of the United States Government by force or violence.
>
> . . .
>
> . . . when a States attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution."

Then the issue of "Right" versus "Privilege" arises again. Justice Black again cites *Ex parte Garland*, the case now having withstood the test of time for over a hundred years:

> **"The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. See *Schware v. Board of Bar Examiners, supra,* and *Ex parte Garland,* 4 Wall. 333 (1867).** This record is wholly barren of one word, sentence, or paragraph that tends to show this lady is not morally and professionally fit to serve honorably and well as a member of the legal profession. It was error not to process her application and not to admit her to the Arizona Bar."

Justice Stewart's fairly short concurring opinion reveals one fact that is particularly interesting. Apparently, the Respondent Arizona Bar conceded that it would deny admission solely because of an Applicant's beliefs, if it found such beliefs objectionable. Justice Blackmun writes the Dissent. He notes that Mrs. Baird was seeking the overruling or delimiting of the *Konigsberg* and *Anastaplo* cases. His response to Mrs. Baird's assertion that answering the question required her to engage in guesswork with respect to associations she had been a member of, was that she could have stated her lack of knowledge. Blackmun addressed the "Right" versus "Privilege" debate as follows:

> "There is talk, of course, in the briefs here about whether admission to the Bar and receiving authority to practice law is a "right" or a "privilege". I am old enough and old-fashioned enough always to have regarded it more as a privilege than as a right. I at least thought that was the tradition. A century ago, Mr. Justice Field referred to the practice of law by a qualified person as a right, and not as a matter of the State's grace or favor. *Ex parte Garland*, 4 Wall. 333, 379 (1867). The Arizona court has spoken in similar terms. Application of Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967). . . . Indeed, this is precisely the way the Arizona court has phrased it:
>
> > "The practice of law is not a privilege, but a right, conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications."
>
> . . .
> The characterization of Bar admission as a right or as a privilege may be little more than an exercise in semantics." [192]

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL V. WADMOND, 401 U.S. 154 (1971)

Based on the opinions in *Baird* and *Stolar* on February 23, 1971 in favor of the Applicants, one would think that this case would also be decided in favor of the Applicants. It was the most important of the three, and the Bar won. In both *Baird* and *Stolar*, Justice Stewart was the swing vote and he only concurred in the judgment, but did not join the lead opinion. In this case, Stewart writes the lead opinion which rules in favor the Bar. Black, Douglas, Marshall and Brennan all Dissent.

Whether one agrees with the viewpoint of the Harlan bloc or the Black bloc, it strikes me as absolutely beyond logical belief that Justice Stewart who was the swing vote in all of the cases, could rule in favor of the Applicants in *Baird* and *Stolar*, and then decide the lead opinion in favor of the Bar in this case on the exact same day. The three cases are virtually impossible to logically reconcile with each other.

The Court in this case is dealing with a group of Applicants, rather than one sole Applicant as in the other cases. None claimed to have been denied admission to the New York Bar. Instead, they launched a broad attack on grounds of vagueness and overbreadth against the system for screening Applicants for admission. The basic thrust of their argument was that the admissions process worked a "chilling effect" upon freedom of speech. As part of the admission process, the Character Committee requested affidavits from two persons (one of whom must be a practicing attorney), and completion of a character questionnaire. The stated purpose was to "be satisfied that such person possesses the character and general fitness requisite for an attorney."

The U.S. Supreme Court (Justice Stewart specifically) dropped the ball in this case. At the time of the opinion, Justice Blackmun was a conservative justice. Subsequent to this case, Justice Blackmun wrote the opinion in *Roe v. Wade*, viewed as a liberal opinion. It had the effect of alienating him from the conservative bloc and he became more liberal as the years went by. There is little doubt in my mind that if he had rendered his vote in *Wadmond*, near the end of his Supreme Court career he would have voted differently.

The stated ground for upholding the admission requirements was that the system for screening applicants was construed narrowly, since it encompassed no more than "dishonorable conduct relevant to the legal profession." The term "dishonorable" obviously is vague and ambiguous. It is a term subject to varying interpretations by different people. The phrase "relevant to the legal profession" is similarly vague, encompassing a wide realm of otherwise lawful conduct. The questions included on the application in *Stolar*, determined to be unconstitutional in Justice Stewart's concurring opinions were:

> 7. List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student.
>
> 12. State whether you have been, or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . . .
>
> 13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member.

In *Baird*, Stewart's concurring opinion concluded that an inquiry as to whether an Applicant had ever been a member of the Communist Party or any organization that advocated overthrow of the United States Government by force or violence was unconstitutional. In *Wadmond*, the related issue was New York's Rule 9406 which required the Applicant to furnish satisfactory proof that he:

"believes in the form of the government of the United States and is loyal to such"

On this point, Stewart votes in favor of the Bar. Whether one agrees or disagrees with the Bars or Applicants generally, Stewart's positions irrefutably lack consistency. Basic predicates of logic dictate that any individual who was knowingly a member of an organization that "advocates overthrow of the United States Government by force" (the ***Stolar*** question) could not possibly "believe in the form of the government of the United States" (the ***Wadmond*** question). Yet, Stewart holds the former to be unconstitutional and the latter constitutional. His illogical justification is as follows:

> "If all we had before us were the language of Rule 9406 . . . this would be a different case. For the language of the Rule lends itself to a construction that could raise substantial questions . . .as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments. But this case comes before us in a significant and unusual posture: the appellees are the very state authorities entrusted with the definitive interpretation of the language of the Rule. We therefore accept their interpretation, however we might construe that language were it left for us to do so. . . .
> . . .
> The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow, and fully cognizant of protected constitutional freedoms. There are three key elements to this construction. First, the Rule places upon applicants no burden of proof. Second, "the form of the government of the United States" and the "government" refer solely to the Constitution, which is all that the oath mentions. Third, "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith.
>
> Accepting this construction, we find no constitutional invalidity in Rule 9406. There is "no showing of an intent to penalize political beliefs."

Essentially, Stewart's position can be summarized as follows. Although the rule looks unconstitutional based on its' express language, since the agency that enacted it says it really means something other than its' express language clearly indicates, it is constitutional. While it is obvious my sentiments in these cases are with Justices Black, Douglas, Brennan and Marshall, I must concede that Justice Harlan's position along with that of his power bloc throughout the admission cases was for the most part at least consistent. For Justice Stewart however, to issue opinions concurring in ***Stolar*** and ***Baird***, and then adopt the foregoing stance in ***Wadmond*** on the exact same day, is in my belief, one of the most unbelievable events to transpire at the U.S. Supreme Court. Justice Black's Dissent is beautiful stating:

> **"the right of a lawyer or Bar applicant to practice cannot be left to the mercies of his prospective or present competitors."**
> . . .
> "the State seeks to probe an applicant's state of mind to ascertain whether he is "without any mental reservation, loyal to . . . the Constitution." But asking about an applicant's mental attitude toward the Constitution simply probes his beliefs, and these are not the business of the State."
> . . .
> "I do not see how today's decision can be reconciled with other decisions of this Court, to which I shall refer later. The majority seeks to avoid this conflict by a process of narrowing construction."

Then the part I love best. Justice Black writes:

> **"As I have pointed out in another case involving requirements for admission to the Bar, society needs men in the legal profession:**
>
> "like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes . . . and the multitude of others **who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it."**

He then concludes:

> **"I must repeat once again that consistently with due process of law, applicants for a profession cannot be turned over to the whim of their prospective competitors to determine their right to practice.** I think the District Court did magnificent service in stripping the New York Bar of much of its unbridled power over the admission of new members. My only regret is that it did not strip it further."

One of the most interesting facets of *Wadmond* is delineated in a Dissent written by Justice Marshall, joined by Justice Brennan. Apparently, during the litigation in the lower courts, many of the practices being challenged were changed by the Bar Committee in order to avoid review by the U.S. Supreme Court. The U.S. Supreme Court dealt only with what Marshall classified as the "residuum of the appellants' original challenge. One of the questions not addressed by the U.S. Supreme Court which personifies the prying, inquisitive and unconstitutional nature of the Bar admissions committee was as follows:

> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness ? If the answer is "Yes," state the facts.

As I read the foregoing question, which I believe raises issues of even greater importance than the political beliefs issues, I earnestly believe that laughter is the proper logical response. Was the Bar admissions committee kidding? How could anyone possibly answer that question? If you don't answer it at all, are you lying? To answer it accurately, do you have to recite your entire biography from childhood ? Here is a hypothetical answer that I have drafted to this question.

> "When I was five I stole a cookie by sneaking into the kitchen when my mom didn't see me. (detrimental).
>
> "When I was six I used the five dollars I got for my birthday to buy my brother a present" (favorable)
>
> "When I was ten I threw a snowball at another kid during the winter." (detrimental)
>
> "When I was eighteen I bought a cute girl at a bar a drink." (favorable?) (detrimental?)

"When I was sixteen and underage I used a false ID like all of my friends to gain admittance into a bar." (detrimental)

"When I was an adult I challenged the State Bar admissions process in Court." (favorable ? detrimental ?)

Additional insight presented by Justice Marshall's Dissent states:

"The underlying complaint, strenuously and consistently urged, is that New York's screening system focuses impermissibly on the political activities and viewpoints of Bar applicant's, that the scheme thereby operates to inhibit the exercise of protected expressive and associational freedoms by law students and others, and that this chilling effect is not justified as the necessary impact of a system designed to winnow out those applicants demonstrably unfit to practice law.

. . .

As we said not long ago in Stanley v. Georgia, 394 U.S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government a power to control men's minds." **The premise that personal beliefs are inviolate is fundamental to the constitutional scheme as a whole. . . . In the present case, we have a rule of New York law which, as written, sanctions systematic inquiry into the beliefs of Bar applicants, and excludes from the practice of law persons having beliefs that are not officially approved. . . .**

. . .

The irreducible vices of due process vagueness, arising when those who may be penalized by a legal rule cannot ascertain the rule's scope and avoid its burdens, . . . are inevitably heightened when the result is deterrence of protected activity. . . . Appellants' fundamental complaint throughout this litigation has concerned the inhibitory impact of New York's screening system of the exercise of First Amendment rights.

. . .

Even when viewed in isolation from Rule 9406, Question 26(a) reveals itself as an indiscriminate and highly intrusive device designed to expose an applicant's political affiliations to the scrutiny of screening authorities. As such, it comes into conflict with principles that bar overreaching official inquiry undertaken with a view to predicating the denial of a public benefit on activity protected by the First Amendment."

. . .

In "stating the facts" as required by Question 26, an applicant exposes himself to the grave risk that screening officials will find him wanting in respect of the requisite beliefs and loyalties. The impermissible latitude of Rule 9406 as a criterion for exclusion, in conjunction with overintrusive probing for details about an applicant's associational affiliations, creates an obvious *in terrorem* effect on the exercise of First Amendment freedoms by law students and others. The interwoven complexity and uncertain scope of the scheme heighten the danger that caution and conscientiousness will lead to the forfeiting of rights by prospective Bar applicants." [193]

Thus ended what my research reveals was the last set of cases dealing with State Bar character inquiries at the U.S. Supreme Court. The year was 1971. Faced with the extreme divisiveness of the Court, it is an issue they apparently do not want to deal with. The ultimate result of the cases is that the Bars are undeterred in their quest to pry into every facet of Applicant's lives. With some exceptions, they steer clear of the political beliefs arena, but everything else is fair game. Denial of admission based on "attitude" is common. Typically, what the Bars do is ask a wide realm of questions. The interview process is then used to subjectively assess the applicant's "attitude," "race" and "appearance," with the determination of whether to admit, based in form on matters included in the application, but in substance on the "attitude," "race," "appearance" and other unconstitutional assessments.

And then, we're supposed to have faith and confidence in the agency that regulates attorneys. To have such faith, would be irrational.

19

CAN THE JUDICIARY WITHSTAND SCRUTINY UNDER ITS' OWN STATE BAR ADMISSION STANDARDS?

The purpose of this section is to demonstrate that the manner in which the Judiciary functions and conducts itself cannot sustain scrutiny under the same standards it imposes upon State Bar Applicants. Generally speaking, a Bar Applicant's moral character is subjectively assessed in light of the following traits:

POSITIVE TRAITS	**NEGATIVE TRAITS**
1. Truthfulness	1. Nondisclosure
2. Candor	2. False Disclosure
3. Honesty	3. Misleading Disclosure
4. Complete Disclosure	4. Evasiveness
5. Good Attitude	5. Bad Attitude

The impact of the existence of any of the above traits is then subjectively assessed by the Bar Committee in terms of materiality. Ultimately, the definition of materiality is itself subject to varying interpretations. The manner in which materiality is defined will often be determinative as to whether admission is granted or denied.

In this section, I briefly analyze 30 subject areas of the law and subject Judicial conduct in these areas to scrutiny under State Bar Character Standards. For ease of reference, I use the acronym **SBCS** to delineate **STATE BAR CHARACTER STANDARDS**. I have selected subject areas in which the Judiciary and State Bars conduct themselves in a manner that would be determined to embody the NEGATIVE TRAITS listed above, if scrutinized in the same irrational manner as a Bar Applicant is assessed.

My goal in doing so is to demonstrate that the SBCS are applied one way to the Applicant, and another to the Judiciary and State Bars. Stated simply, I seek to prove the existence of a double standard. The point is that the Judiciary and State Bars can not meet their own standards of moral character. Since many (but not all) of the following judicial positions are concededly necessary to ensure efficient functioning of the Judiciary, the solution to balancing application and avoiding a hypocritical, double-standard would be a more lenient application of the SBCS to Bar Applicants. A process not predicated on arbitrary discretion, but rather upon objective criteria. The questions to reflect on when considering each subject are:

1. Is the Judiciary in the stated instance being totally candid, frank, truthful and completely disclosing all information?

2. Alternatively, is the Judiciary being misleading, evasive, or failing to disclose material information in a less than candid manner?

1. THE EXISTENCE OF DISSENTING JUDICIAL OPINIONS CAN NOT SUSTAIN SCRUTINY UNDER SBCS

It is impossible to reconcile the manner in which Dissenting judicial opinions make accusations against the majority and vice versa, with the standard of candor demanded in the admissions process. This concept is not unique to any one particular area of the law. The Dissent typically accuses the Majority of failing to disclose pertinent facts in a case, misinterpreting the law, failing to follow case precedent, and a wide host of other severe criticism. The Majority then does the same thing trying to discredit the Dissent. Nor is this concept unique to one particular category of courts. It applies equally to state appellate courts, state supreme courts, federal appellate courts, and even the U.S. Supreme Court.

To assess the impact of allegations made by the Dissent and the Majority against each other, reference to the SBCS is appropriate. Each time judges sitting on an appellate bench disagree with each other and accuse each other of nondisclosure, misstatements of law, misinterpretations of law or miscategorization of the materiality of a factor, one side must unavoidably be engaging in conduct that exemplifies the same type of "character flaw" that results in the denial of so many admissions. Since however, such disagreements are not only integral to the system, but beneficial to the development of law, basic logic mandates that the Judges should not be blamed for doing so.

Two possible fair solutions exist. One would be that the Bar Applicant's disclosure be afforded the same leniency as given appellate Judges writing opinions. The other would be to hold the Applicant to a slightly more stringent standard than appellate Judges, but to only make inquiry of the Applicant in those subject areas that further a compelling state interest. Obviously, inquiry should be made whether the Applicant has been convicted of a crime, and a false answer should be grounds for denial of admission.

There is little doubt that if the SBCS were applied to appellate opinions, there would be literally hundreds, and perhaps thousands of state and federal Judges that could not gain admission into a State Bar. Since it is logistically impossible for two diametrically opposed positions to be correct, every single time the Majority and Dissent disagreed on a particular issue, one of them would have to be deemed as stating a falsehood. Assuming their stated falsehood is not manifested by an "intent to deceive," it should be tolerated as merely an incorrect opinion. The assessment of one's truthfulness therefore, must be predicated on whether they had an "intent to deceive." To the extent that State Bars falsely conclude a nondisclosed or falsely disclosed matter absent an "intent to deceive" reflects poorly on character, they hypocritically adopt a double standard by failing to adopt a similar conclusion with respect to appellate Judges.

2. APPELLATE REVIEW OF TRIAL COURT DECISIONS CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS

The exact same theory germane to accusations in Dissenting and Majority appellate opinions is applicable to consideration of trial court decisions by appellate courts. Since both the trial court and the appellate court can not be correct if their positions are diametrically opposed, then application of the SBCS would require the conclusion that either the trial court or the appellate court has lied. For instance, the law can not simultaneously require that evidence is both admissible and inadmissible. It can not require that a particular motion should have been granted and also that it should not have been granted. Stated simply, the entire appellate review process does not sustain scrutiny under the SBCS.

3. LICENSED ATTORNEYS ARGUING MOTIONS CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS

The same theory applies to attorneys arguing motions. Applying the SBCS, since two attorneys having diametrically opposed positions cannot both be correct, one must be lying. One attorney is right and the other is wrong, so one must be stating the law falsely. Such uniform application of the SBCS between Applicants and licensed attorneys would mandate the conclusion that over 50% of all attorneys lack good moral character. As soon as an attorney lost a motion in any case, they would be labeled a liar.

4. ATTORNEYS AGREEING TO REPRESENT GUILTY CLIENTS CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS.

The matter can be carried even further. What about attorneys who agree to represent clients that they know are guilty? Applying the SBCS, isn't that attorney "misleading" the jury and Court by presenting facts in the light most favorable to their client? If the attorney doesn't do so, then hasn't that attorney lied by agreeing to represent the client to the best of their ability?

5. STATE BAR UNAUTHORIZED PRACTICE OF LAW PROHIBITIONS (UPL) CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS

UPL prohibitions are falsely propagandized by State Bars as intended to ensure that the public receives competent legal services. Even assuming arguendo, that their stated justification was genuine, the legitimacy of UPL prohibitions would still fail scrutiny under the SBCS, because the "competency" argument is undermined by the fact that every single motion contested by attorneys on opposing sides of a case results in one party losing. The SBCS would therefore mandate a conclusion that one attorney performed incompetently. You would be left with over 50% of the attorneys classified as incompetent, even though UPL prohibitions purportedly ensure competency. For UPL prohibitions to sustain scrutiny, they must be exempted from the character assessment applied to Bar Applicants.

6. CERTIFIED COURT TRANSCRIPTS CAN NOT SUSTAIN SCRUTINY UNDER SBCS

The SBCS encompasses a basic requirement that the Bar application must be "Complete and Accurate." The most miniscule errors or immaterial nondisclosures are often falsely construed by the State Bars as supporting an irrational conclusion that the Applicant was untruthful. Yet, certified court transcripts, purportedly "Complete and Accurate" are uniformly replete with minor errors and omissions. Attorneys typically only request transcript corrections for egregiously material false statements included in them.

7. COURT CALENDAR SETTING AND HEARING DATE ASSIGNMENTS CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS

Typically in most Courts, Hearings on minor motions and cases, or sometimes even sentencing are scheduled for a large group of cases at the same time. Often it is called “Motion Day,” “Motion Call,” “Trial Call,” or “Traffic Court.” The litigants or their attorneys receive a scheduled date and time for the Hearing. Sometimes two, ten, twenty or fifty cases are scheduled for the exact same day at the same time before the same Court. The Court’s concept is that the litigants will be taken one at a time, and should just wait their turn. This often results in litigants waiting for hours or wasting an entire day. Such a policy is arguably unavoidable due to the high volume of cases. Nevertheless, it does not sustain scrutiny under the SBCS. Stated simply, since it is logistically impossible for the Court to hear more than one case at a time, the Court is “knowingly” disseminating false information to the litigants in the other cases. The Court is disseminating a written document that falsely states a Hearing will be at a specific time, when in fact the Court possesses knowledge rendering such an impossibility. Unlike prior issues discussed, in this instance, the Court's false statement is made knowingly, since the Court is fully aware that all litigants cannot possibly be heard simultaneously. Does the Court lack "good moral character?"

8. CHARACTER EVIDENCE NOT ADMISSIBLE AT TRIAL, BUT IS ADMISSIBLE AT A BAR HEARING

The Federal Rules of Evidence and most State Rules of Evidence contain a provision excluding character evidence from admissibility in criminal cases. The concept is that a Defendant should be adjudged guilty or not guilty based on the particular facts of their case, rather than their character. To give an example, if a person is prosecuted for robbery, the Court should not admit evidence that the Defendant is a nasty person. Nastiness is a character trait unrelated to the issue of whether the Defendant committed robbery. The intent of the rule is to avoid having the jury convict the person of robbery, just because they believe the person is nasty.

The Bar admission character review process is totally predicated on character, and therefore character evidence is not only admissible, but considered to be the most significant evidence of all. The issue is whether all character evidence should be admissible or just character evidence related to a person's ability to practice law. How do you determine what is “related to the practice of law?” Doesn’t consideration of character evidence related to an individual’s personality in the admissions process suffer from the same infirmity as in the context of a criminal prosecution? Should individuals be denied admission because they are nasty? Smart-alecky? Glib? Facetious? Pompous? Arrogant? If arrogance and pompous nature constitute valid grounds for denying admission, there are a whole lot of Judges who lack good moral character. But then again, I’m glib, facetious and smart-alecky.

9. JUDICIAL STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL and "HARMLESS ERROR" DOES NOT SUSTAIN SCRUTINY UNDER THE SBCS

A criminal defendant can have their conviction overturned if they receive ineffective assistance of counsel. That is a basic rule of law, but the standard for establishing ineffective assistance of counsel is virtually impossible to meet. The defendant must demonstrate that the counsel they received was not only ineffective, but also that it caused "reversible error." Ineffective assistance that does not rise to such a level merely constitutes what is known as "harmless error." Two very straightforward examples are as follows.

If counsel for a defendant fails to do any investigation, fails to cross examine any prosecution witnesses, fails to call any witnesses on behalf of the defendant and fails to allow the defendant to testify on his own behalf even though the defendant insists on doing so, chances are that will constitute "reversible error." Conversely, if defense counsel cross-examines most prosecution witnesses, but does not cross-examine one particular witness, chances are it is "harmless error." The above examples are extreme. Most cases fall in between.

The tendency in recent years has been to conclude that most allegations of ineffective assistance of counsel constitute harmless error. Conversely, in Bar admission proceedings, virtually all errors made by the Applicant are determined to justify denial of admission (reversible error), while material errors committed by the Bar committees are determined to be harmless in nature. Essentially, the concept is that rules are applied strictly to the Applicant, but leniently to the Bar. The ineffective assistance of counsel claim similarly results in a strict standard applied to the defendant, and a lenient standard applied to the lawyer.

Two points are certain. First, if defense counsel were subject to the same standard of "reversible error" that the Bar Applicant is subjected to, virtually every single criminal defendant represented by a public defender would have their conviction overturned. Second, if every Bar Applicant were subject to the same standard of "harmless error" that defense counsel currently enjoys the benefit of, there probably wouldn't be a single person denied admission to the Bar.

10. STANDARD FOR JUDICIAL DISQUALIFICATION DOES NOT SUSTAIN SCRUTINY UNDER THE SBCS

Similar to the ineffective assistance of counsel claim, a litigant is purportedly entitled to Disqualify a Judge, if the Judge has an actual bias against the litigant, or even if the Judge merely appears to have a bias against the litigant. The concept is that since a litigant is entitled to a fair trial, that right is only secured if the trial is presided over by a fair and impartial Judge. The letter of the law on this issue, as a matter of form, phrases this constitutional right in a very strong manner. Many appellate opinions give the impression to the reader, that litigants may Disqualify a Judge if there is even the slightest inkling that the Judge may not be impartial. As a matter of substance however, those judicial opinions are "misleading" and "fail to disclose" the true nature of the Motion to Disqualify. The fact is that a Motion to Disqualify is granted in only rare instances. Instead, the mere filing of such a motion, typically functions to anger the irrational, hyper-emotional sensitivities of a Judge. This then causes the litigant to lose their case. The Motion to Disqualify is substantively viewed by the Judiciary in a manner similar to the English Star Chamber notion that one should not file legal documents which offend the crown.

Two points are applicable to assessing the Motion for Disqualification in light of SBCS. First, as stated previously the case law gives the reader a false and misleading impression that cuts directly into the integrity of the judiciary. Second, is the fact that if the accused Judge were held to the same

standard of character faced by the Bar Applicant, the number of Motions to Disqualify that would be granted, would be dramatically increased. Once again, the Judge enjoys a lenient standard, while the Bar Applicant is subjected to an irrationally strict standard. This occurs for the purpose of fostering the economic interests of the legal profession by ensuring that attorneys will be supportive of their Bar rather than their clients, and that the number of attorneys does not exceed that which fosters maximization of legal fees.

11. STATE BAR CONTROL OF THE APPLICANT AND THEREFORE THE LAWYER'S ATTITUDE, LIFESTYLE AND PERSONALITY

The cases discussed later herein will demonstrate that a major purpose of the admissions process is to provide the State Bars with power to control the Applicant's attitude, lifestyle and personality. The cases are replete with admission denials predicated on the Bar's false and irrational determinations that particular Applicants should be rejected because they are glib, facetious, arrogant, or like to go out and party to much. The Bars seek to convey a message that the lawyer not only within the context of their legal practice, but throughout all aspects of their life should conduct themselves as conservative conformists deferring to the status quo.

The Bars have absolute power over the lawyer's ability to earn a living. Through the admissions and disciplinary process they can deny a qualified individual the ability to earn a living practicing law. By leveraging the Applicant's ability to earn a living, the Bars ultimately control the lawyer. They control the lawyer in ways extending far beyond ethical concerns that function as a direct, infringement on the lawyer's constitutional rights. Once the Bar's plot succeeds, (as it already has for the most part), they control litigation outcomes through their power to control the conduct of the lawyers involved. The premise is as follows:

> Control a man's ability to feed his family and you control the man. Control the man's attitude, personality and lifestyle, and you control everything the man does. Since the lawyer's primary function is litigation, then controlling his ability to earn a living allows you to control the manner in which he litigates. Control the manner in which he litigates, and you essentially control litigation outcomes. All other branches of government are then largely nullified and the adversarial process obliterated in favor of State Bar control. Juries are no longer the decision makers, as the outcomes are predetermined by State Bar politics.

12. SBCS DIMINISHES PUBLIC CONFIDENCE IN THE LEGAL SYSTEM DUE TO THE ABSENCE OF CLEARLY, DEFINED CRITERIA THAT RESULTS IN ARBITRARY CHARACTER ASSESSMENTS

The oblique standard for assessing an Applicant is whether they have "good moral character." What constitutes "good moral character" is a theoretical concept that has never been clearly defined. It incorporates social mores, beliefs, philosophy, politics and countless other ambiguous subject areas. As such, the standard has been criticized by the U.S. Supreme Court as follows:

> *"The term "good moral character" has long been used as a qualification for membership in the Bar, and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will*

necessarily reflect the attitudes, experiences, and prejudices of the definer. ***Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."***

Konigsberg v. State Bar of California, 353 U.S. 252 (1957)

It is the manner in which the State Bars have consistently failed to heed the warning of the U.S. Supreme Court in *Konigsberg*, by engaging in the arbitrary and discriminatory denial of the right to practice law, that forms the heart and soul of this author's criticisms. The result is an unavoidable dimininution of public confidence in the legal system. The Bars have essentially exempted themselves from the constitution. Courts regularly conclude that legislative enactments are unconstitutional on the ground they are vague and ambiguous, but admissions requirements are exempted. Arbitrary and capricious decisions by executive department agencies are regularly overturned, but State Bars enjoy inordinate discretion to render the same types of arbitrary decisions. Due process requirements imposed upon other professional licensing agencies are held by the Courts as inapplicable to the State Bars since the deference given to the Bars, escapes the constitutional restraints imposed on non-lawyer agencies. The State Supreme Courts which have furthered the State Bar's quest for political and economic domination have realistically adopted in substance, the following position:

> "We, the Judiciary Branch will ensure that Due Process concerns are complied with for Non-Judicial agencies. We will ensure that the First Amendment is complied with by Non-Judicial governmental officials. We will ensure that the Constitution is complied with by Non-Judicial Agencies. However, since we alone have the sole right to interpret the law, we have determined that many of these constitutional restraints are inapplicable to our own agencies."

13. MIRANDA APPLIES TO POLICE, BUT NOT JUDGES

Under the historic U.S. Supreme Court case, *Miranda v. Arizona*, 384 U.S. 436 (1966) a judicially created doctrine was implemented that required police officers to read certain criminal suspects their rights. The reading of the "rights" includes informing the person that they have the right to remain silent. This is fairly common knowledge throughout the nation and can be seen on countless television shows. The citizen's right to remain silent is incorporated within the Fifth Amendment to the Constitution. Incorporated within the Fourteenth Amendment is the right to a fair and impartial trial. As discussed previously, litigants including most particularly, criminal defendants purportedly have a right to disqualify a Judge based on the existence or appearance of bias.

It is remarkable that police officers who should not be expected to have knowledge of the law equivalent to a Judge, are required to inform suspects of their Fifth Amendment right to remain silent, but Judges are not required to inform litigants of their right to move for judicial disqualification.

The right to move for judicial disqualification is a constitutional right of at least equal importance to the right to remain silent. Infractions by police officers of the right to remain silent can be quickly remedied by the trial court's exclusion of evidence illegally obtained. However, infractions by Judges against the right to a fair trial before an impartial Judge are tougher to remedy. An appeal that may take years is normally required. Once again, the Judiciary applies an often impracticable requirement on Non-Judicial officials (i.e. police officers), but is not willing to hold themselves to the same stringent standard.

The obvious rebuttal to my position, is that if such were required, virtually every single criminal defendant would move for judicial disqualification. My response is simply that if the defendant does not have adequate grounds, the motion would just be denied. Quick and easy. The litigants should be informed of the existence of the constitutional right however. Currently, very few litigants are even aware of the "purported" constitutional right to move for judicial disqualification. The Court's failure to openly disclose the existence of the right is a large reason. It is a right in form, but not in substance.

14. RACIAL PROFILING IS A BIGGER PROBLEM IN THE STATE BAR THAN THE POLICE FORCE

A great deal of attention has been given by the media to the issue of racial profiling by police. It is predicated largely on police traffic stops based on the race of a car's occupants. While the concerns appear to be well warranted, they pale in comparison to the racial profiling engaged in by State Bars. The entire admissions process as demonstrated by the NCBE Bar Examiner articles discussed previously, has been predicated on keeping racial minorities out of the profession. The ambiguous and vague "good moral character" requirement implemented without clearly, defined criteria has allowed continued attainment of State Bar prejudicial goals. It is a clear and irrefutable example of racial profiling in the worst manner imaginable. It affects the justice system more detrimentally than police racial profiling. The Bar admissions process is the portal to the gates of justice. Exclude minorities from the profession and you exclude their ability to vindicate their constitutional rights and receive competent representation. The anticompetitive State Bar attorneys additionally succeed in maximizing legal fees by such tactics. A lower supply of lawyers to fill an ever-increasing demand, results in higher costs to satisfy that demand, at the expense of a fair justice system for minorities.

15. JUDICIAL ELECTIONS CAN NOT SUSTAIN SCRUTINY UNDER SBCS

In the State of Oregon, like many but not all other States, Judges as a matter of form are elected by the public. As a matter of substance, they are not. What typically happens is as follows. There is an unwritten understanding that when a Judge is ready to retire, they will resign shortly prior to conclusion of their six-year term. The open slot is then filled by an appointed Judge. Once the new Judge is seated, they become the incumbent at election time. Incumbent Judges typically run unopposed and rarely lose if they are opposed. What has occurred as a matter of substance, can be summarized as follows.

The process of Judicial elections intended to allow the public to select their Judges has been surreptitiously circumvented by the Judiciary, to consolidate their power, by allowing selection of Judges to rest amongst the attorneys, rather than the public. The unwritten policy, which is quietly supported by attorneys and Judges, flies directly into the face of the SBCS, which purportedly requires Judges to not be misleading, evasive or to circumvent the law. The Oregon Judiciary has effectively excluded itself from the moral character standard it ostensibly promotes. It accomplished this by taking control of the elective process. They "mislead" the public into believing Judges are elected, when as a matter of substance, they really are not.

16. THE *MARBURY V. MADISON* JUDICIAL POWER GRAB CAN NOT SUSTAIN SCRUTINY UNDER THE SBCS

It is the most significant case in American legal history and was decided in 1803 by the most famous U.S. Supreme Court Justice ever, John Marshall. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803) established many important constitutional principles, the most significant of which was the premise that the power to interpret the law rests solely and exclusively with the Judiciary.

Discussion of *Marbury*, could encompass an entire book by itself. I address only a few points briefly and provide an abbreviated summary of the facts. In the early years of the first decade of the nineteenth century, our nation was on the brink of civil war. The presidential election of 1800, events preceding it and events immediately following it were the cause. The two political parties at that time were the Federalists and the Republicans. The Federalist Party was arguably the forerunner to the Republican Party as we know it today, and the Republican Party at that time was arguably the forerunner to the Democrat Party as we know it today. Sounds weird, I know, but that's the way it was.

The Federalists had dominated national politics since 1789 when the Constitution was adopted with George Washington serving two terms as President and John Adams one. President John Adams was a Federalist, but his Vice-President, Thomas Jefferson was the founder of the Republican Party. In later years, the election system was redesigned to preclude a President and Vice-President from being in opposing political parties. In 1800, Jefferson and Adams were running against each other. Aaron Burr, who years later would be tried for treason in a trial presided over by John Marshall was also a presidential candidate. Without addressing all the details, the election was extremely acrimonious even though years before, Jefferson and Adams had been very close friends, and in subsequent years would mend fences. At this time however, they were political enemies. In the election, Adams finished in third place. Burr and Jefferson, tied with 73 votes. The determination of who would be President and who would be Vice-President was therefore thrown to the House of Representatives. Republicans in the House voted straight down the line for Jefferson and Federalists voted straight down the line for Burr. After thirty-five ballots, there was still no winner. On the thirty-sixth ballot, Congressman James A. Bayard who was the sole representative of Delaware, changed his vote to an abstention which resulted in Jefferson's election.

Adams, in any event, was a clear loser having finished third. John Marshall was the Secretary of State in Adams' administration. Adams was bitter about his loss and was still the existing President until Jefferson's inauguration. Marshall was a Federalist. Jefferson and Marshall detested each other. Interestingly, they were second cousins, both tracing their maternal descent to the powerful Virginia Randolphs. Marshall's mother-in-law, Rebecca Ambler had been Jefferson's first fiancee and there is suggestion that she spoke regularly about Jefferson being untrustworthy. Jefferson on the other hand, thought Marshall was a hypocrite.

In an attempt to maintain Federalist control of the U.S. Supreme Court, President Adams nominated John Marshall to the post of Chief Justice. On March 2, 1801 two days before his Presidential term expired, President Adams nominated forty-two people to the office of Justice of the Peace. They were immediately confirmed by the lame-duck Federalist Congress and Adams immediately signed the commissions. They have come to be known historically as "the midnight judges." The commissions were never delivered however, and President Jefferson when he took office found them lying on a table in the State Department.

The individual vested with the responsibility to deliver the commissions, and who was remiss in doing so, was none other than the Secretary of State, John Marshall who by this time was Chief Justice of the U.S. Supreme Court. The reason the commissions were not delivered has never been fully explained. In any event, once Marshall vacated the office of Secretary of State that duty fell upon the new Secretary, James Madison who was appointed by Jefferson.

Madison at Jefferson's behest refused to deliver some of the commissions, including that of a man named Marbury. The new Republican Congress at this time was attempting to secure repeal of the Judiciary Act of 1801 that allowed for the appointments, and the remaining Federalists were opposing repeal. The Federalists wanted the constitutionality of the Act to be determined by the U.S. Supreme Court, since that Court was controlled by the Federalist John Marshall. It is easy to see the whole thing wreaks of politics.

The Supreme Court issued an Order to Show Cause to James Madison, the Secretary of State. The Supreme Court at this time was by far the weakest of the three branches of government. Madison simply ignored the Court's order and didn't respond. The Court set a hearing. Madison under the direction of Jefferson did not appear, did not file a brief, and just flatly ignored the whole matter. Jefferson was essentially slapping Marshall's ego in the face, by completely ignoring the Court's authority. The legal issue facing the Court was the constitutionality of the Judiciary Act of 1801, which allowed for the appointment of Marbury. Jefferson, a Republican President supported by a Republican Congress knew that even if Marshall declared the Act constitutional, and the commissions valid, Marshall had absolutely no way to enforce the decree. A Federalist Supreme Court going up against a popular Republican President, supported by a Republican Congress would not stand a chance.

What Marshall did, has gone down in history as one of the most brilliant political coups ever. Certainly, the most successful seizure of power that ever occurred in this nation. Marshall gave Jefferson the small win, but took a much bigger win. Writing on behalf of the Court, he held that Marbury was not entitled to his commission and that the Judiciary Act of 1801 was unconstitutional. That seemed to be a win for Jefferson who didn't even appear in the proceeding. Marshall did so however, on the ground that the U.S. Supreme Court had **sole authority to determine the constitutionality of a legislative statute.**

At the time, Jefferson didn't give Marshall's opinion a second thought. From his perspective, whatever Marshall did was meaningless, because Jefferson had the power. It would not be until years later that the impact of Marshall's opinion in *Marbury v. Madison* would be felt. He had seized a huge chunk of political power for the Judiciary. The power to interpret law is the power to say what the law is. The power to define it in a manner not intended by the Legislature. The power to nullify it. In fact, the power to interpret law, is immensely greater than the power to enact law.

Now, for the reason I present this historic case herein. **First, the most historic case affecting judicial power in this nation was an opinion written by a Judge who should have disqualified himself from hearing the case. Marshall was personally involved in the events. He had been the Secretary of State with the responsibility to deliver the commissions. He was the one who had initially failed to do so.** If Marshall had held the commissions to be valid, then he would be blamed for their non-delivery. By holding the commissions invalid, Marshall vindicated his own personal position. Second, the politics between the Federalists and Republicans diminished the legitimacy of the opinion. Third, the power to interpret law can be used in the same manner as the power to interpret "good moral character" with respect to State Bar admissions. Essentially, it means whatever the Court says it means at any given point in time. Fourth, one branch of government should never be allowed to seize a huge block of power for itself.

The basic predicates of law established in *Marbury v. Madison* could never withstand scrutiny under the SBCS. Marshall did not adequately disclose his own involvement in the case while functioning as Secretary of State. The failure of the Court to fully disclose its own political interest in the case was "misleading" and "evasive." Applying the SBCS, one must unavoidably conclude the U.S. Supreme Court was untruthful in their presentation for the purpose of increasing their own power. **Take note that I am not asserting the U.S. Supreme Court was untruthful in its presentation of the case. Rather instead, I am asserting that if the State Bar admissions process criteria (SBCS) was applied to the U.S. Supreme Court, that is the conclusion that would be reached.**

Having criticized the manner in which the judicial cornerstone of *Marbury v. Madison* was adopted, it is important to point out that I do not disagree with its ultimate holding. My concern is with the facts surrounding adoption of the opinion. In large part, I agree with the final conclusion, although not totally. I fervently believe the Judiciary is vested with the primary responsibility for determining the constitutionality of a statute. It is best suited to do so, because vesting the Judiciary with this power, keeps Legislatures which frequently adopt crazy and irrational laws, in a position of checked power. If the Judiciary does not determine a statute's constitutionality, then realistically who can? The Legislature? Definitely, not a good idea for obvious reasons. The Governor or President, depending on whether the issue is federal or state law? Once again, definitely not a good idea, since no one person should have that much power.

The Judiciary is best suited to determine a statute's constitutionality, and in fact I believe it has substantially **underutilized** this authority. There are so many ridiculous and unconstitutional statutes floating around, it is unbelievable. The fact that I believe the Judiciary should be vested with the power to declare statutes unconstitutional, does not conflict with my position above. It is when the Judiciary carves out the sole, and not merely the primary responsibility for "interpreting," valid, constitutional statutes that I believe the greater problem arises. **The Judiciary over-utilizes its limited authority to "interpret," valid statutes by turning them into something those statutes are not. Then they become in essence, super-legislatures. Conversely, the Judiciary under-utilizes its' power to declare unconstitutional, those statutes which are irrational, and should do so more often.**

17. AWOPs EQUAL JUDGE SLOP AND CAN NOT SUSTAIN SCRUTINY UNDER SBCS

They're known amongst lawyers as AWOPs, which stands for "Affirmed Without Opinion." A litigant in a civil or criminal case appeals a trial court judgment and the appellate court affirms, but without an opinion. The concept of AWOPs fails scrutiny under the SBCS, because by failing to publish the basic facts of a case, and the reasoning supporting its' conclusion, the Court is "evasive." It is "evasive" by attempting to escape presentation of the contested issue, for the purpose of "concealing" from the public the grounds supporting the litigant's attack upon the trial court's judgment. They are "misleading," because they convey the impression that the litigant's position is completely without merit or legal basis, when in fact AWOPs are often rendered in cases where the litigant has raised valid points. AWOPs are typical in cases involving intellectual attacks upon the legal profession's competency, such as ineffective assistance of counsel, judicial disqualification, evidence tampering, contempt, State Bar power, the unauthorized practice of law, and yes of course, State Bar admissions. Sometimes, AWOPs are even issued in cases that have received a great deal of attention at the trial court level by the media. AWOPs in those instances are the most suspect, as the media and general public have already expressed an interest in the legal issues involved.

18. TOTAL INDEPENDENCE EQUALS BEING ALONE

How many parents have a teenage child that says they are old enough to be independent? A few days later, the kid asks for money? Parents know, that for the kid to be independent, they have to be earning a living. The phrase typically goes, "So long as you're living in my house, you'll abide by our rules."

The Judiciary is designated under our constitution as a branch of government independent from the Legislative and Executive branches. What does that mean though? Does the term "independent," mean "totally independent," or "independent within reasonable constraints," or "more independent than the other branches, but not completely independent?" This issue is constantly disputed, and no one really has a final, definitive answer. The conclusion in this author's belief must lie in reason and rationality. Total independence must immediately be ruled out. The teenage kid analogy takes care of that immediately. If the Judiciary is totally independent, then let them find some other way to pay judicial salaries and run the courts, instead of asking Legislators for funding. By the same token, it must be accepted that the Judiciary is more independent than the other branches, because the term is not applied to the other branches. The mere presence of the term must have some meaning, or it would not have been included in the Constitution. By the same token, reasonable restraints must apply to the notion of independence, or otherwise the government would be condoning irrationality.

If the foregoing premises seem acceptable with respect to independence, how do they apply to the licensing requirement of filing a "complete and accurate" application. Shouldn't the phrase "complete and accurate" be construed in a reasonable manner, so the Applicant is not penalized for immaterial nondisclosures? Shouldn't the concept of "materiality" be defined in a reasonable manner, rather than encompassing minor nondisclosures based on the false assertion that disclosure may have led to the discovery of other negative information? Shouldn't the phrase "good moral character" given its possible use as a "dangerous instrument" be construed in a reasonable manner that minimizes such potential ? No one is totally independent. Independence must be construed in reasonable, limited terms. Otherwise, the Judiciary stands alone, from the rest of the nation. Similarly, admission standards must be applied to the Applicant in a reasonable manner.

19. THE INFAMOUS STAR CHAMBER AND THE STATE BAR ADMISSION PROCESS

It is often cited by Pro Se litigants who are angry with the unfair treatment they receive from courts, prosecutors or the police. It has become a worldwide symbol of what a justice system should not be. Most citizens have heard of it, and perhaps even used the phrase on occasion, but few know what it really was. It was called the "Star Chamber." And it personifies the State Bar licensing process. The character review utilizes the inquisitorial method, by obtaining evidence directly from the Applicant to impugn his own moral character. Essentially, the concept is to place the Applicant in a position where they testify against themselves. Refusal to provide the requested information constitutes grounds for denial of admission. The English Star Chamber has been described by the U.S. Supreme Court in several cases, which the reader should consider when reading Bar admission cases of the various states. The following are notable quotes from the U.S. Supreme Court on the Star Chamber.

A. FARETTA V. CALIFORNIA, 422 U.S. 806 (1975)

"In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and Judicial character, and characteristically departed from common law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has, for centuries, symbolized disregard of basic individual rights. The Star Chamber not merely allowed, but required, defendants to have counsel. **The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed.**

. . .

The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it.

By the common law of that time, it was not representation by counsel, but self-representation, that was the practice in prosecutions for serious crime. At one time, every litigant was required to "appear before the court in his own person and conduct his own cause in his own words. While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason. Thus, in the 16th and 17th centuries, the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights—to notice, confrontation and compulsory process—that we now associate with a genuinely fair adversary proceeding."

. . .

"The proceedings before the Star Chamber began by a Bill "engrossed in parchment and filed with the clerk of the court." It must, like the other pleadings, be signed by counsel. . . . However, **counsel were obligated to be careful what they signed.** If they put their hands to merely frivolous pleas, or otherwise misbehaved themselves in the conduct of their cases, they were liable to rebuke, suspension, a fine, or imprisonment. . . . **Counsel, therefore, had to be cautious that any pleadings they signed would not unduly offend the Crown.**"

. . .

"Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel. The effect of this rule, and probably its object, was that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious."

B. MICHIGAN V. TUCKER, 417 U.S. 433 (1974)

"The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. . . .**Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers'desire to protect citizens against such compulsion**."

. . .

"The Court has thought the privilege necessary to prevent any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

C. JENKINS V. MCKEITHEN, 395 U.S. 411 (1969)

"The statutory requirement that the Commission "shall base its findings and reports only upon evidence and testimony given at public hearings . . . is plainly designed to protect witnesses and persons under investigation from what some members of the Court have criticized as secret inquisitions or Star Chamber proceedings."

D. IN RE GAULT, 387 U.S. 1 (1967)

"We are warned that the system must not "degenerate into a star chamber proceeding with the judge imposing his own particular brand of culture and moral on indigent people."

E. PIERSON V. RAY, 386 U.S. 547 (1967)

"Historically, judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, "ought not to be drawn into question for any supposed corruption <for this tends> to the slander of the justice of the King."

F. ANONYMOUS NOS. 6 AND 7 V. BAKER, 360 U.S. 287 (1959)

"In fact, it was Star Chamber judges who helped to make closed-door court proceedings so obnoxious in this country that the Bill of Rights guarantees public trials and the assistance of counsel. And secretly compelled testimony **does not lose its highly dangerous potentialities merely because it represents only a "preliminary inquisition. . . . whereby the court is given information that may move it to other acts thereafter."**

G. HANNAH V. LARCHE, 363 U.S. 420 (1960)

"Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny . . . . Modern as well as ancient history bears witness that both innocent and guilty have been **seized by officers of the state and whisked away for secret interrogation** or worse until the groundwork has been securely laid for their inevitable conviction."

H. IN RE OLIVER, 333 U.S. 257 (1948)

"The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries . . . said :

> **". . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge—that judge will be at once indolent and arbitrary; . . . Without publicity, all other checks are insufficient, in comparison of publicity, all other checks are of small account**. Recordation, appeal, whatever other institutions might present themselves in the character of checks, **would be found to operate rather as cloaks** than checks ; as cloaks in reality, as checks only in appearances."

20. JUDICIARY FEIGNS WEAKNESS TO GAIN POWER

It is an age-old power ploy. Feign weakness, for the purpose of accumulating power. Those in control of the Judiciary and particularly the State Bars, do so by falsely asserting they are the weakest branch of government, whenever their authority in a particular area is disputed. It is nothing more than a diabolical, brilliant trick that obviously fails scrutiny under the SBCS. You could not possibly have a situation where the State Bars are more misleading, than those instances where they feign weakness. They are anything but weak. They are fearsomely powerful.

21. THE NEED TO PROTECT CITIZENS FROM MOB RULE

Mob rule is irrational rule resting on emotions of the moment. The public mob that lynches an innocent person is the most obvious example. A street gang mugging a couple is another. Ten police officers beating a suspect. Mob rule is unacceptable as being obnoxiously in violation of the rule of law, and basic principles of justice and fairness. Similarly, the public needs to be protected from a State Bar predicated on functioning cohesively as a group unit (mob rule) in furtherance of economic goals, by subjecting Nonattorneys to unreasonable UPL prohibitions and irrational Bar admission standards.

22. *STATE OF OREGON V. BALFOUR*, 311 Or. 434 (1991)

State of Oregon v. Balfour, 311 Or. 434 (1991), is a case addressing the ethical responsibilities of an Oregon attorney when a criminal defendant wants to raise issues on appeal that the attorney believes are frivolous. The Oregon Supreme Court in rendering its' opinion made an unprecedented, and incredible statement about U.S. Supreme Court opinions addressing the issue. The Oregon Supreme Court wrote:

> "Thus, **we are neither bound** nor relieved of our own duty in the matter **by the United States Supreme Court's prior estimations** of the proper ethical course of action for an appointed attorney who concludes that only frivolous issues exist for appeal."

Several points strike me with respect to the foregoing that I raise as questions. First, to the extent an appointed attorney concludes only frivolous issues exist for appeal, and thereby refuses to raise those issues, can a correlation be drawn with the Star Chamber tactic of not filing pleadings that may offend the crown? Second, if the Oregon Supreme Court through the use of irrational logic can exempt itself from complying with U.S. Supreme Court opinions, then why should the Oregon Court of Appeals consider itself as bound by State Supreme Court decisions, or Oregon trial judges consider themselves bound by Court of Appeals decisions, or citizens consider themselves bound by trial court orders? Isn't the Oregon Supreme Court's statement an abandonment of the rule of law? How can that same State Supreme Court rationally stress the importance of the rule of law, if it is not willing to be bound by the law itself? Isn't the Oregon Supreme Court committing the precise immoral act condemned by State Bars in admission proceedings of "evading" the law by writing an opinion that utilizes "misleading" logic to convey a false impression, that it has a power which it lacks? Isn't it "failing to disclose" that it is irrefutable the Oregon Supreme Court is bound by U.S. Supreme Court opinions? The answers to these questions, I believe are obvious. The foregoing statement in *Balfour* can not sustain scrutiny under SBCS.

23. JUDICIARY'S INFILTRATION OF LEGISLATIVE BRANCH CAN NOT SUSTAIN SCRUTINY UNDER SBCS

The Judiciary and State Bars consistently assert they are a "totally independent" branch of government, rather than construing independence reasonably. Attorneys are licensed by State Bars, and the Bar is an agency of the Judiciary. Yet, attorneys are regularly elected to Legislative positions and even the Presidency. When an attorney is elected to a Legislative post, the Judiciary gains power. It already has full control of its own branch. When an attorney is elected to the Legislature, a member of the Judiciary (i.e. that attorney), exercises control within the Legislature. What happened to the "total independence notion?" It does not seem to apply when the Judiciary seeks to exercise control over other branches.

To the extent the Judiciary claims "total independence," while simultaneously promoting the election of attorneys to Legislative and Executive positions, its' claim is disingenuous and misleading. The State Bars "fail to disclose" their self-interest in exercising control over other branches of government. In doing so, they "evade" the essence of our government which mandates a separation of powers. The Judiciary has full control over its own branch. To the extent, it infiltrates other branches, it obtains partial control and substantial influence of another. If 40% of Legislators are attorneys, then the Judiciary through its licensing power has control over 40% of the Legislators. It then has control over not only the interpretation of law, but also its' enactment.

24. THE GAMES JUDGES PLAY CAN NOT SUSTAIN SCRUTINY UNDER SBCS

Judges play many, many games that are not within the realm of fair play. Political head games with litigants and lawyers predicated on judicial trickery and deception. None could possibly sustain scrutiny if subjected to SBCS assessment, as they are characterized by evasiveness, misleading conduct and a lack of full disclosure about what the Judge is really seeking to achieve. Here are a few examples:

a. **Intentional Delay in Ruling on Motions or Appeals** - Litigants typically must file certain motions or responses or pleadings within set time frames, but no fixed time limits are imposed on Judges to render a ruling. This includes both State and Federal Courts of Appeals, and even the U.S. Supreme Court. Often, Judges will delay rendering a ruling, even though they know what the law mandates, simply to see what the litigants will do in the interim. They want to determine if either litigant will engage in conduct, that will convince the Judge to issue a different decision than the law demands. Litigant conduct may cause the Judge to not like a litigant's attitude, which then improperly forms the basis for a judicial decision.

b. **Hearing Postponements** – Judicial rulings on requests for postponements are often predicated on the Judge's perception of litigant or attorney attitudes. Factors influencing judicial strategy may play a key role, rather than basing the postponement decision on what the law demands. Often the granting of a postponement is intended by the Court to delay an appeal, or wear down a litigant financially and emotionally, if the Judge wants them to lose. Judges also grant postponements sometimes to avoid ruling because the Judge knows the party he dislikes is correct as a matter of law.

c. The Judicial Pocket Veto - Often the Judge will rule on a motion, but delay entering the Order into the court docket or signing the Order, or fail to send a copy of the Order to a Party. They may do so in an attempt to deprive a party of notice. They also may be trying to trick a party into committing a contempt so that party will have to expend resources defending themselves against a meritless contempt charge. Obviously, one cannot comply with an Order if they have no knowledge of the Order's existence. The Judicial Pocket Veto is often utilized by Judges to give a Party that the Judge likes extra time to plan a counter-attack against the opposing litigant who the Judge dislikes. It's obviously a dishonest judicial tactic, but occurs quite often.

d. The Judicial Tactic of Ruling Without Ruling – It is well known amongst attorneys, that to encourage parties to settle a case, the Judge will often delay ruling on a motion, but nevertheless proceed to tell the attorneys in a private conference, what the ruling would be, <u>if</u> he were ruling at that time. That is a virtual blackmailing designed to coerce the intended losing party into settling the case. Litigants need to be particularly careful in these instances. Judges that engage in such tactics can be deceptive turncoats. They will often say their ruling would be one way during a conference to get the parties to settle, but then rule in the opposite manner if it is not settled.

e. THE ULTIMATE JUDICIAL GAME –
Procedure versus Substance- Standards versus Rules

It's the ultimate game of all. It allows the Judge to circumvent the law even though it is ostensibly designed to do precisely the opposite. Each litigation is supposed to proceed under defined rules and procedures. Virtually any rule or procedure however, can be disregarded by the Judge in his discretion if such furthers the "interests of justice." The vague notion of what constitutes, the "interests of justice" suffers from the same ambiguity as the concept of "good moral character." Stated simply, it allows Judges to substantively render decisions based on whether they like a litigant's attitude, rather than what the rule of law mandates. Rules can be disregarded by the Judge, or alternatively rules can be used to justify the outcome. Whatever the Judge likes.

f. The Certified, Complete and Accurate Court Transcript – The phrase "complete and accurate" is defined quite differently in the context of court certified transcripts, compared to its use in admission proceedings. Any small, immaterial error on the Bar application, leaves the Applicant open to false accusations of untruthfulness, but court transcripts almost always contain "immaterial" errors, and lawyers are expected to ignore them.

g. Objections – Another game Judges will play is depriving litigants or their attorneys of the right to object. The concept flies directly into the face of the litigant's Due Process right to be heard, yet it occurs regularly. Judges will sometimes rule against a litigant, solely because they raise objections. Essentially, this judicial game is predicated on the Judge's desire to "get even" with a litigant for making the Court look bad. It is similar in nature to the Star Chamber mandate that one should not file pleadings that "offend the crown." Judges believe that one should not Object in a manner that offends the crown.

h. Judges determine litigation outcomes, not Juries – The general public is under a misconception that substantively juries render verdicts. Juries do so only as a matter of form. The Judge for the most part determines the ultimate outcome in most jury trials, by controlling what evidence the jury hears. If the Judge excludes evidence favoring a Defendant and admits all evidence favoring the Prosecution, then obviously the Defendant's probability of being convicted has been unjustly increased. The Judge has then "failed to disclose material matters" to the jury, for the purpose of "deceiving" them into making an incorrect decision. Obviously, this judicial game can not withstand scrutiny under SBCS.

i. The Fining and Jailing Judicial Game – The debtor prison is alive and well in America. In any particular case, a Judge can impose a "Fine" upon a litigant or their attorney simply because of their "attitude." The Judge can determine without rational basis that a litigant has the financial ability to pay the Fine, and that failure to pay mandates their imprisonment for contempt. For those that doubt this premise, it is my guess there are more than a few unemployed, noncustodial parents in prison for nonpayment of child support who could attest that the debtor prison is alive and well. Alternatively, one could also find convicted individuals in certain states who didn't pay their "public defender" for the alleged legal services provided, and wound up in jail for contempt. The U.S. Supreme Court has held that inability to pay a debt precludes imprisonment for nonpayment. There are few U.S. Supreme Court opinions violated more pervasively.

25. CORRELATION OF STATE BAR ADMISSION STANDARDS WITH DEPRIVATION OF DUE PROCESS RIGHTS TO PRO SE LITIGANTS

Each time an Applicant is denied admission, ostensibly on the State Bar's falsely asserted ground that they lack "good moral character," the attorneys of a particular state have one less potential attorney to compete against. The Supply of attorneys is therefore diminished, to service the ever-increasing Demand for legal services, resulting in higher legal fees for paying clients. There is another side however, to the equation.

The Demand element has its own distinct Supply component. This is because while the Demand for legal services is always increasing, the Supply of clients <u>able to pay</u> does not necessarily increase. The Supply of clients is limitless, but the Supply of "Paying Clients" is not. The "Supply of Paying Clients" is what the attorneys seek to service. They are not interested in servicing the endless Supply of indigents. Included within the category of indigents are Pro Se litigants (individuals who represent themselves). Pro Se litigants represent themselves because they are unable to pay an attorney, or because they believe an attorney will betray them, or because they believe attorneys are not sufficiently competent in the law, or simply because they feel they can do a better job representing themselves. Pro Se litigants represent the same type of economic threat to the State Bar's interests as Bar Applicants. When a litigant represents himself in lieu of hiring an attorney, the attorney they otherwise would have hired is deprived of a legal fee. The profession therefore suffers an economic detriment. This of course is only the case if the Pro Se would have been able to afford an attorney. An incentive is therefore created to ensure that Pro Se litigants lose their cases. Judges assist with accomplishing this goal by an invidious application of the Procedure-Substance dichotomy when rendering rulings.

The Judge will base rulings on the degree of knowledge that the Pro Se possesses, to best further the legal profession's economic interests. For instance, when the Pro Se is more competent than opposing counsel (as often occurs), the Judge will ignore procedural rules under the guise that doing so is "in the interests" of justice. The Rules of Civil Procedure in a State normally include a catchall

provision that allows the Judge to do this. The catchall rule is typically similar to the following example:

> *"The court shall, in every stage of an action, **disregard any error or defect in the pleadings** or proceedings **which does not affect the substantial rights** of the adverse party."*
>
> **Oregon Rule of Civil Procedure 12B**

> *"All pleadings shall be liberally construed with a view of substantial justice between the parties."*
>
> **Oregon Rule of Civil Procedure 12A**

The above rules typical of most states, are a blank check to allow counsel to violate the written law, if the Court determines that doing so, "does not affect the substantial rights of the adverse party" and is done so with a "view of substantial justice." Such determinations obviously hinge on vague criteria that the Court alone has discretion to assess. When the above cited rules are applied, the impact is purportedly that the substance of a party's arguments take precedence over legal procedures. Conversely, if the Court is faced with a Pro Se litigant possessing minimal knowledge of the law, going up against a licensed attorney, the Court will apply procedural rules strictly. Minor defects in written submissions are then used to justify ruling against the Pro Se. Opposing counsel in such instances will present petty procedural arguments in order to grab a quick win. The Pro Se is therefore between a rock and a hard place. The Court Rules ostensibly designed to equalize the playing field, instead are used to further State Bar interests by fostering application in a manner that ensures Pro Se litigants lose.

This is designed to discourage other people from litigating Pro Se. Hence, the phrase "A man who represents himself has a fool for attorney." The legitimacy of the saying is predicated not on the Pro Se litigant's legal ability, but rather instead on the legal profession's economic interest that mandates steps be taken to ensure that litigants hire licensed attorneys. In the absence of Judicial Bias against Pro Se litigants, there would be a lower Supply of paying clients available for attorneys. Pro Se litigants are neutralized by the Judiciary to maximize the available Supply of paying clients for licensed attorneys.

26. THE MUTING OF GIDEON'S TRUMPET

(*Gideon v. Wainright*, 372 U.S. 335 (1963))

It is one of the most famous cases in legal history. It was heralded as one of the greatest triumphs of constitutional rights in America. As a result, it inspired a best selling book, called "Gideon's Trumpet." Ultimately however, throughout the decades the case has been so successfully circumvented by State Courts that it functions as a virtual nullity. In fact, the holding in *Gideon* has been used not to further it's original intent, but rather instead, to further the economic interests of attorneys. A brief summary of the case is as follows.

Clarence Gideon, an indigent, was indicted for breaking into a poolroom with intent to commit a crime. The trial court judge refused his request for a lawyer and forced him to conduct his own defense. He was convicted and it was affirmed on appeal. Gideon then sent the U.S. Supreme Court his Petition, scrawled in pencil in childlike handwriting on lined prison sheets, claiming that he was denied due process because he was denied counsel. The Justices appointed Abe Fortas to represent him (later to become a U.S. Supreme Court Justice himself). They voted unanimously in his favor. They held that the Constitution provided a right to counsel in a criminal case. After their decision, criminal defendants

had a right to be represented by an attorney at public expense. Such attorneys are known as "public defenders." Typically, the indigent Defendant is not required to pay for their representation.

Well, you get what you pay for. Public defenders have proven themselves to be absolutely worthless. In their defense, this is largely because they are given case loads that make it logistically impossible to provide zealous representation. *Gideon* was intended to provide indigent defendants with legal representation, so they would not have to represent themselves. Instead, the effect has been that they are provided "no representation," and coerced into relinquishing their right of self-representation. It functions as follows. The prosecution typically tramples over the defendant's rights, while the so-called "public defender" remains silent. Rarely objecting, rarely interviewing witnesses, rarely engaging in any zealous cross-examination and rarely presenting evidence on behalf of the defendant. The tactic of providing a criminal defendant with counsel for the purpose of ensuring their conviction, is exemplified by the following quotes regarding the Star Chamber:

> "The proceedings before the Star Chamber began by a Bill "engrossed in parchment and filed with the clerk of the court." It must, like the other pleadings, be signed by counsel. . . . However, counsel were obligated to be careful what they signed. If they put their hands to merely frivolous pleas, or otherwise misbehaved themselves in the conduct of their cases, they were liable to rebuke, suspension, a fine, or imprisonment. . . . **Counsel, therefore, had to be cautious that any pleadings they signed would not unduly offend the Crown."**
>
> **"Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel.** The effect of this rule, and probably its object, was that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious."

After *Gideon*, prosecutors became astutely aware that the opinion provided them with a unique opportunity to legally trample defendants. Many shifted from a mindset of opposing appointment of counsel, to opposing defendant requests of self-representation. The new issue was whether defendants had a constitutional right of self-representation, since they had the right to counsel. Stated simply, did they have a constitutional right to decline the assistance of counsel? The U.S. Supreme Court held they did. As stated previously though, the Pro Se litigant's ability to obtain a fair adjudication is frustrated by the trial court's manipulative use of the Procedure-Substance dichotomy.

The end result is that defendants have their due process rights trampled in one manner if they accept counsel, and in another if they decline counsel. The only criminal defendants with an opportunity for a fair trial with zealous representation, are those with money to pay an attorney. Ah, now that was the true goal all along!

27. LEGISLATIVE STATUTES INCREASE JUDICIAL POWER

Marbury v. Madison held that the Judiciary has the sole power to interpret law. As previously stated, I support giving the Judiciary the right to declare statutes unconstitutional, but have problems with the legitimacy of John Marshall's participation in the case, due to his personal involvement prior to its' adjudication. I agree the Judiciary should have the power to declare statutes unconstitutional, and also believe it is a power **underutilized,** since there are so many unconstitutional statutes floating around. It is however irrefutable that the more statutes a Legislature enacts, the more power it gives the Judiciary. Each time a statute is enacted, the Judiciary obtains a potential opportunity to interpret law. The Judiciary thus has an incentive to promote passage of statutes. Statutes provide the Judiciary with opportunities to make the final assessment of law.

Few legislators consider the degree to which their over-zealousness in lawmaking, results in a transfer of power from the Legislature to the Judiciary for the above reason. **Hypothetically, consider the consequences if a law existed prohibiting every single action a person could possibly take from the most innocent to the most heinous. Ultimately, the complete determination of what societal behavior is acceptable and what is not, would be left to the Judiciary by virtue of its power to interpret law. It could declare valid or invalid each and every law, and therefore would have total control over societal behavior.**

28. THE CONTEMPT POWER CAN NOT WITHSTAND SCRUTINY UNDER SBCS

The power of a Judge to hold a litigant or counsel in Contempt and then fine them or jail them, is predicated on the notion that the Court must be able to maintain order, and enforce its rulings. It is a power historically recognized as subject to dangerous abuse. Nevertheless, it must be conceded that a Court does need some means to ensure compliance with its Orders. The issues are what the scope of that power should be, what penalties the Court should be able to impose, and should the same Judge that renders an Order be allowed to determine whether a Contempt has been committed. Is committing Contempt a Crime? The Sixth Amendment to the United States constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, **by an impartial jury . . . ."**

Courts typically hold that Contempt proceedings do not require a jury trial. They classify Contempts between those constituting "Summary Contempt," "Criminal Contempt" and "Civil Contempt." **How can the Judiciary justify the label of "Criminal Contempt," without providing a jury trial?** It cuts directly into the face of the Sixth Amendment, yet occurs regularly. The allowance of Criminal Contempt "convictions" without a jury trial cannot sustain scrutiny under SBCS. The label of "Criminal Contempt" without providing a jury trial, in light of the express language of the Sixth Amendment, is at a bare minimum "MISLEADING."

29. THE PREMISE THAT "IGNORANCE OF THE LAW IS NO EXCUSE FOR VIOLATING IT," CAN NOT SUSTAIN SCRUTINY UNDER SBCS

It is a fundamental predicate of our justice system. Citizens are presumed to be on notice of the laws, and are held responsible for violating them, even if they are ignorant of the law's existence. Stated simply, the argument that "You're honor, I didn't know it was illegal," is not a valid defense. Arguably, the premise is a necessity. Otherwise, every accused person, would assert they didn't know the conduct they are accused of committing was illegal. The laws would then have no meaning.

By the same token, the "ignorance of the law is not an excuse" predicate creates serious dilemmas. Citizens who are knowledgeable in the law have an advantage over other citizens because they know what they can and can't do. Everyone knows certain things are illegal, but in the overwhelming preponderance of areas, the determination is uncertain. Judges don't even know what is legal or illegal in many areas, because there is conflicting case law. Is making a loud statement in a public square legal? Is carrying a sign legal? Does it depend on what the sign says? Most importantly, is it really fair in these ambiguous areas to hold the accused accountable, if the Judges cannot even uniformly decide? To the extent an issue is embraced by conflicting case law, it can be fairly stated that "ignorance of the

law" is a certainty, rather than just a possibility. What constitutes the law in such areas has not even been conclusively determined prior to occurrence of the accused's alleged conduct.

The standard that "ignorance of the law is no excuse for breaking it," is a societal necessity to a certain limited degree, but does not sustain scrutiny under the SBCS. Where the case law is conflicting, the government has "Failed to Disclose" to the accused, prior to occurrence of their allegedly illegal conduct, what the law really is. Applying SBCS, it must be concluded that the attempt to convict individuals in those areas where case law is conflicting, is a situation where the government "misleads" one into thinking their conduct may be lawful. To the extent, the government applies the portion of conflicting case law supporting the assertion that the conduct was illegal it inescapably "evades" opposing case law. The notion that "ignorance of the law is no excuse for violating it," is admittedly necessary to a limited degree to preserve societal order. It does not however, withstand scrutiny under SBCS where the traits of being Misleading, Evasive, and Failing to Disclose are applied in an unreasonable, irrational and hyper-strict manner.

30. PARSING OF WORDS

Attorneys are the best at it. Politicians run a close second, but some say they are the best. The concept was arguably invented by Socrates, whose Socratic method became the basis for teaching in American law schools. Parsing of words is what I'm talking about. The ability to dissect one term or series of words, and then use that definition to arrive at the conclusion you seek. Socrates would ask a student a question, and then through a series of additional questions disprove the answer to the original question. He developed a method whereby he could disprove both of two diametrically opposed answers, even though logic seemingly mandates that they both could not possibly be incorrect.

The State Bars use it to obtain evidence during the inquisition of an Applicant. The concept of parsing words to suit your immediate needs is predicated on the fact that words individually have very precise meanings. The problem is that in order to explain their meaning, you have to use other words which are not nearly so precise, and then determine the definition of those other words. It becomes an almost endless inquiry, predicated on the ability of the person being asked the question, to continually define words beyond their common and ordinary meaning. Here is a quick and easy example. The witness in a hypothetical criminal case is being cross-examined:

Q. You saw him beat the other man, didn't you?
A. I don't know what you mean when you say, beat ; he did push the other man.
Q. Why did he attack the other man?
A. I don't know that I'd say he attacked him either, it was just one push, kind of like a shove.
Q. So he kind of threw the other man then?
A. No, he just shoved him.
Q. What do you mean shoved?
A. He pushed him
Q. Did he push him hard?
A. What do you mean hard?
Q. Did he push him with great force?
A. It was one push with only one hand.

The foregoing demonstrates the problem. The witness and the attorney are each trying to convey a meaning, but can not agree on the simplest of terms such as beat, push, attack, shove, threw,

hard and force. Yet, the everyday citizen probably has in their mind a conception of each. The words have different meanings and convey different messages depending on what other words accompany them. Parsing of words is a dangerous instrument used by the Judiciary. It can be an effective tool to negate protections and rights. When does a "search" become a "search" subject to Fourth Amendment protections? If the term "search" is defined in an incorrect manner beyond its ordinary usage, then that definition could have the effect of negating protections afforded by the Fourth Amendment.

More to the point of the subject matter herein, what is the definition of "good moral character?" If defined to include only those individuals who support the economic interests of their State Bar, then the problems are evident. If "bad moral character" is defined to incorporate minor immaterial instances of questionable conduct, then that definition diminishes reliance on how "good moral conduct" is defined. What does the term "rehabilitation" mean? What is "fair?" What is "just?" And of course, going back to the age-old philosophers, what is "truth?" I wouldn't even attempt to suggest I can answer these questions. Certainly, State Bar admission committees are at least as incompetent to do so, since I'm smarter than they are.

The manner in which the definition of words can be used to mean whatever one desires has been summed up in a dissenting opinion of the Oregon Supreme Court as follows:

> *"When I use a word," Humpty Dumpty said in rather a scornful time, "it means just what I choose it to mean -- neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things" "The question is," said Humpty Dumpty, "which is to be master -- that's all."*
> Lewis Carroll, Through the Looking-Glass, Macmillan and Co. 1872, p. 124
> As Cited in State of Oregon ex rel Frohnmayer, 307 Or. 304 (1989)
> (Footnote 2-Justice Carson - Dissenting)

The point was also made by Justice Oliver Wendel Holmes who wrote:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v Eisner, 245 U.S. 418 (1918)

20

STATE BAR ADMISSION CASES BY INDIVIDUAL STATE

ALABAMA

379 So. 2d 564 (1980)

IT'S NOT WHAT YOU DO, BUT WHO YOU KNOW, THAT ULTIMATELY DETERMINES WHETHER YOU HAVE GOOD MORAL CHARACTER. ARRESTS ARE NO PROBLEM AS LONG AS YOU KNOW JUDGES.

The Committee refused to certify the Applicant as a law student on character grounds. The State Supreme Court reversed. The Applicant disclosed on his application a number of relatively minor offenses, but failed to disclose others. When confronted by the Committee with information pertaining to other offenses, he admitted them and subsequently disclosed even further additional offenses. He filed his application in 1976. The Supreme Court decided in his favor four years later. The offenses with their applicable dates and disposition were as follows :

A.	1965	Arrested as a "runaway." It appears he was a minor at the time. Held for one night and sent back to Alabama.
B.	1967	Arrested for hopping a freight train. No charges filed.
C.	1967	Arrested on suspicion of burglary and contributing to the delinquency of a minor. No charges filed.
D.	1967	Arrested for hitchhiking in Arizona. Fined $ 24.00. Police records indicated he was jailed for fourteen days. The Applicant testified the police records were in error and he was jailed for only four days.
E.	1967	Arrested for possession of marijuana. Charges dismissed.
F.	1973	Arrested for DWI. Disposition not clear from Court's opinion.
G.	1973	Arrested in Tennessee for possessing an open can of beer in a moving vehicle and fined $ 25.00.
H.	1974	Arrested for disorderly conduct, pled guilty and was fined $ 55.00.
I.	1974	Arrested on suspicion of narcotics possession. No charges filed.

J. 1975 Arrested in Florida for driving down the wrong side of the road. Entered a plea of nolo contendere and paid a fine of $ 24.00.

K. 1977 Arrested for disturbing the peace. Dismissed.

L. 1978 Arrested for driving with a broken headlight. Dismissed.

In sum, the Applicant had been arrested approximately 12 times beginning in 1965 when he was a minor, until 1978. Six of the twelve arrests resulted in no charges being filed, or dismissal. Equity and logic would therefore mandate they be discounted. The remaining six arrests that resulted in either guilty pleas or fines, were for hitchhiking, possessing an open container of beer, DWI, disorderly conduct and driving down the wrong side of the road. With the exception of the DWI, the offenses are of a minor nature, notwithstanding the fact they are admittedly somewhat cumbersome in number.

The most serious of the offenses (the DWI) was the one the Applicant fully disclosed right from the start on his initial application. It was the minor matters that came to light subsequently. Most of the arrests occurred while the Applicant was just entering his adult years. The Committee's decision to deny certification was based in large part on the Applicant's failure to disclose the arrests resulting in no charges or dismissed charges. They asserted this demonstrated a lack of candor on his part. The actual question on the Bar application was as follows:

> "Have you ever been **charged** with violating any State or Federal law or City Ordinance? If so, state fully on separate sheet, giving dates, places and outcome? **Note: Minor traffic violations need not be shown."** [194]

Applying the precise language of the question, some of the incidents could be construed as "minor traffic violations," not requiring disclosure. Further, items C, E, I, K and L resulted in either dismissal or no charges. While the arrest record is admittedly long, his degree of non-compliance with the inquiry is not particularly egregious. Rather instead, it is the question which focuses on "charges" rather than "convictions" which is faulty. On the positive side, the Applicant submitted recommendations from 28 judges and what is characterized in the opinion as "other outstanding members of the Bar." The State Supreme Court cites *Konigsberg I* for the premise that the notion of moral character and fitness is vague in nature, stating:

> "The term "good moral character has long been used as a qualification for membership in the Bar . . . However, the term, by itself, is **unusually ambiguous**. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the **attitudes**, experiences and **prejudices** of the definer. Such a **vague** qualification, which is easily adapted to fit **personal views** and predilections, can be a **dangerous instrument for arbitrary and discriminatory** denial of the **right** to practice law."

The State Supreme Court reverses the Committee, on the ground that the letters of recommendation from judges and lawyers satisfied the burden of proof for demonstrating good character. Therein, is the key of the case. Whether an objective reader agrees that this Applicant should be admitted based on the fact that his nondisclosures were minor, one point is irrefutable. The ultimate ruling in his favor was not predicated on assessing the seriousness of his nondisclosure, but instead on the letters of recommendation. Essentially, the conclusion one inescapably reaches is that whether an Applicant possesses good moral character is not based on their acts, but instead on "who

they know and who they are friends with." It is a disappointing case. I agree with the Court's decision to reverse the Bar Committee, but believe they did so for the wrong reason. In my view, it is the "acts" one commits or doesn't commit that should ultimately determine whether they possess good moral character, not how powerful their friends are.

The State Supreme Court in this case admirably asserts the wonderful premises of *Konigsberg I*, declares that the ability to practice law is a "Right" and a "valuable property right," but then predicates its' reversal on letters of recommendation from powerful and influential individuals in the State. Take away this Applicant's judicial friends and attorneys and he is going to be denied admission.

519 So.2d 920 (1988)

YOU MUST BE OPEN AND CANDID DURING THE APPLICATION PROCESS, BUT WE AT THE BAR LIKE TO HIDE THINGS UNTIL THE MOST STRATEGICALLY OPPORTUNE MOMENT.

FOR YOU THE APPLICANT TO WIN AGAINST US, IT'S NOT ENOUGH TO SHOW WE WERE WRONG. YOU HAVE TO SHOW WE WERE REALLY, REALLY, REALLY, WRONG, BY A WHOLE LOT. THE COURT SPOTS US A FEW POINTS IN THE GAME.

The Applicant, a female executed a sworn application for registration as a law student in 1982 and submitted her application for admission in 1985. The Committee advised her that a Hearing would be held in February, 1986 and gave her a letter written by an attorney to the Committee containing unfavorable information about her. The Court's opinion states as follows:

> "Enclosed in the letter to <Applicant> was a copy of letter written by an attorney containing information unfavorable to <Applicant> regarding her past employment and **personal life**."

A major issue became the procedural manner in which the Committee handled the proceedings and the standard of review to be applied by the Court. Essentially the question is, should the Court review the matter anew based on all the facts (a de novo review) without adopting a presumption in favor of the Committee's findings, or should it adopt a presumption in favor of the Committee, and reverse only if their decision is unsupported by clear and convincing evidence. The distinction is important.

Essentially, if the Court adopts a presumption in favor of the Committee, they can affirm its' decision even though they think it may be wrong. Obviously, it would seem adopting such a presumption diminishes reliability of the review process. The Applicant asserted a "de novo" review was proper. In the last case, 379 So. 2d 564 (1980) where the Applicant had favorable letters of recommendation from Judges, the Court adopted such a standard stating:

> "Consequently, we do not indulge in any presumption in favor of the findings by the Committee on Character and Fitness."

Now however, the Court refuses to do so. Instead, they change the playing field in a post hoc manner asserting that the review standard pertaining to disciplinary enforcement should apply. This is notwithstanding that the Applicant is not even a member of the Bar. The Court cites 381 So.2d 52, 54 (Ala. 1980) for the premise:

> "the Supreme Court, on review, will presume that the Board's decision on the facts is correct: and the disciplinary order will be affirmed unless the decision on the facts is unsupported by clear and convincing evidence, or the order misapplies the law to the facts."

The Court then states:

> "This standard is appropriate, given the posture of the case before us . . ."

The Applicant makes a beautiful argument that the failure of the Committee to include Findings of Fact renders the reviewing court unable to ascertain whether the Committee's decision is supported by the facts. Essentially, the Applicant is saying:

> "how can you determine if the decision on the facts is supported, when the Committee failed to state the facts it relies on."

The argument is inescapably sound. The Court departs from logic however stating:

> "Although the inclusion of findings of fact in the order is encouraged, it is not a requirement"

That is quite simply put, judicial logic at its worst. The final argument posed by the Applicant was that she was prejudiced in defending against the charges related to her character because the Bar delayed disclosing that they had received derogatory information. The derogatory letter from the attorney was received by the Bar prior to submission of her application, but the Bar didn't inform her of its' existence until approximately 20 months later. The Bar was baiting her. Their concept was:

> "Don't tell her about the derogatory information received even though she registered as a law student. Let's wait, until she actually applies to the Bar, then we'll nail her."

The Court bails out and holds that the admission rules contain no requirement that the Bar inform a law student of information that might reflect unfavorably on the student's prospective application for admission. This allows the Bar to "mislead" the registered law student into believing their is no character issue pending. A concurring opinion recognizes the blatant unfairness stating:

> "The lack of such a rule, however, does not validate the admission procedure nor does it exonerate the Bar of its responsibility to promulgate and recommend for adoption a procedure through which it will be possible to resolve such situations in a more equitable manner." [195]

The interesting aspects of this case are twofold. First, the Court changed the standard of review post-hoc for the specific purpose of altering the playing field against the Applicant. They relied on a standard applicable to disciplinary proceedings even though in the prior admissions case they held the standard should not contain a presumption in favor of the Committee. Secondly, the Bar baited the Applicant by failing to disclose unfavorable information obtained during the law student years even though she had registered as a law student. To this extent, the Bar violated its own standard of moral character. It was not entirely candid, open or truthful and this could impact on the ability of the Committee members to practice law. Perhaps the public needs to be protected from Bar Examiners. The Court recognized that the Bar's belated disclosure of the derogatory letter impacted unfairly on the Applicant. It nevertheless allowed the Bar to benefit from its' unethical conduct for the purpose of penalizing the Applicant. This was accomplished through a manipulative use of the rules of construction used to interpret Bar rules. Such manipulation assures that the rules always function to the benefit of the Bar, and to the detriment of the Applicant.

Versuslaw 1999.AL.0042917 Case No. 1980749 (December 30, 1999)

THE STATE BAR POCKET VETO

The facts in this case are absolutely incredible. The Alabama Bar refused to render a decision of any nature for the specific purpose of depriving the Applicant of his right to appeal. The Applicant applied to the Alabama Bar in 1994. He was previously a member of the Georgia Bar, but was voluntarily disbarred in 1985 after a felony shoplifting conviction. On his application to the Alabama Bar, he fully disclosed the shoplifting conviction, prior membership in the Georgia Bar, and the fact that he was disbarred in Georgia. The Alabama Bar sent him a form noting that his application for admission was deficient because he did not include a certificate of good standing from the Georgia State Bar. He then wrote the following letter to the Georgia State Bar:

> "I am applying to take the Alabama Bar. In making application I need a letter from the Georgia Bar to the Alabama Bar as to why I was disbarred. In the application they requested a letter of good standing from the previous bar. I stated I was disbarred for felony shoplifting . . . and therefore was not in good standing. As I can understand their request they now want a letter from the Georgia Bar confirming that fact."

The Alabama Character Committee then requested his appearance at a January, 1995 meeting. During that meeting, he again informed the Committee that he had been disbarred in Georgia. The chairman of the Committee stated as follows to him:

> "You have to have a certificate of good standing from any bars of which you've ever been a member or which you are a member. And to get the certificate of good standing, I would think you'd have to go in and be reinstated."

Essentially, the Alabama Bar was taking the position that before he could apply for admission to the Alabama Bar, he had to be reinstated by the Georgia Bar. The Committee Chairman then stated:

> ". . . the panel has decided that we can't approve your application at this time. . . . We could let you withdraw your application at this time and . . . you could make some closer inquiries into the reinstatement in the State of Georgia. . . .
> **. . .**
> . . . And it breaks my heart to be sitting here telling you this, but I think at this point you can either withdraw it or we will disapprove your application, whichever you think."

The State of Georgia had previously **unconditionally pardoned** the Applicant for the shoplifting offense. The Applicant sent a copy of the pardon to the Alabama Bar. He then sent a letter to them explaining that the **Georgia State Bar would not issue him a "certificate of good standing" unless he was readmitted which would require retaking the Georgia bar exam, paying a $ 3,000.00 filing fee, submitting 100 letters of recommendation from members of the Georgia State Bar, and submitting to several levels of review before even being allowed to retake the Georgia bar exam.** The executive director of the Alabama State Bar replied in a letter dated November 13, 1996 as follows:

> "When you appeared before the Character and Fitness Committee of the Alabama State Bar on January 11, 1995, the committee made it plain that in order for them to act upon your application to sit for the Alabama bar exam, it was necessary for you to re-establish your membership in good standing with the Georgia Bar . . . . I also point out to you that obtaining a certificate of good standing from the Georgia Bar will not automatically clear you to sit for the Alabama bar

> exam. Your application will still have to be reviewed and considered by the character and fitness committee . . . . Unfortunately, unless you are reinstated by the Georgia Bar, thereby obtaining a certificate of good standing, **we cannot process your application**. . . ."

On December 4, 1996, the executive director then sent the Applicant a letter that stated in part:

> "**There is no appeal** from the requirement that you be reinstated as a member in good standing with the Georgia State Bar. . . ."

The Applicant then filed a Petition for a Writ of Mandamus with the Alabama Supreme Court to compel the Alabama Bar to make a decision on his application. It is important to note that he was not seeking actual admission by instituting such a legal proceeding. Rather instead, he was just seeking to force the Bar to render some type of decision on his application. This would then procedurally allow him to appeal the decision. The State Supreme Court rules in his favor stating:

> "The issue, says <Applicant>, is whether the ASB, through its Committee on Character and Fitness can refuse to act on an application for admission to the State Bar. We agree with <Applicant> that it cannot.
> . . .
> Thus, when <Applicant> supplied ASB with documentation of his full pardon and the restoration of his civil rights, he had complied with ASB's requirement for a completed application and he was entitled to have a ruling on it.
>
> We cannot and will not direct the Committee as to how it should rule. . . . We simply require the Committee to rule on an application. . . ."

The most interesting part of the case is in a concurring opinion by one Justice that states:

> > "I concur in the result because **I cannot find in the Rules Governing Admission . . . anything providing that membership in good standing in the bar of another state is a . . . prerequisite** for a determination by the Character and Fitness Committee. . . ." [196]

This case can be summarized as follows. The Alabama Character Committee attempted to "evade" rendering a decision for the purpose of frustrating the Applicant's right of appeal. It "falsely represented" that a certificate of good standing was required for them to render a decision, when in fact the rules contained no such requirement and the Court ultimately held the opposite to be true. The Bar "misled" the Applicant during the initial Character meeting when it falsely indicated that "it breaks my heart," because in fact at the time, they were achieving the precise result they wanted, notwithstanding the illegality of their position. The Alabama Bar was doing everything it possibly could throughout the case to immorally, unethically and unconstitutionally bust this guy's chops. To accomplish such, they were "misleading," "evasive," and engaged in "false disclosure." When it came right down to it, as the concurring opinion notes, the Alabama Bar didn't even have an enacted Rule in place pertaining to the key issue of the case. They just took it upon themselves to apply arbitrary rules informally enacted on the spot, to fit their immediate anticompetitive interests.

It is my determination that the Character Committee members should have been suspended from the practice of law for a period of two years. After two years they should be allowed to reapply and would be readmitted only upon participating in a formal character interview, and upon showing sufficient remorse and rehabilitation for their immoral, unethical and deceptive conduct which obviously reflects adversely upon their ability to engage in the practice of law.

ALASKA

620 P.2d 640 (1980)

IT AIN'T NO PRIVILEGE, BABY.

Is the ability to practice law a Right, or alternatively a Privilege to be granted only upon the grace and favor of the State? The U.S. Supreme Court held unequivocally in *Ex Parte Garland* that it was a Right. *Garland* has never been overturned and therefore should be considered binding law. Quite simply put, whether a particular State irrationally believes the ability to practice of law is a Privilege, they should refrain from deciding a question already decided by the U.S. Supreme Court. Nevertheless, they persist in addressing it and are about evenly split on the issue.

In this case, the Alaska Supreme Court holds that the ability to practice law is a fundamental right. A nonresident of Alaska who was a member of the Texas and Washington Bars appealed denial of her application. She was denied admission on the ground that she did not meet the 30 day residency requirement of Alaska. The residency issue became a hot item of Bar admission litigation in the 1980s. The purpose of presenting this case is for its' discussion of Right versus Privilege. The Court states in its' opinion deciding in her favor:

> "We agree with the New York Court of Appeals, and the commentators, that the **practice of law by qualified persons is a "fundamental right"** triggering scrutiny under the privileges and immunities clause. The United States Supreme Court has recognized the fundamental right to engage in "common callings" and to pursue "ordinary livelihoods." The Court has protected, under the privileges and immunities clause, the right to fish, to market goods, and to be employed in jobs arising from state oil and gas leases. Assuming that there was once a status distinction between engaging in common occupations and in professional pursuits, it is not of constitutional significance. **The practice of law is like any other species of trade or commerce.** In Corfield v. Coryell, 6 Fed. Case No. 3,230 p. 546 (C.C.E.D. Pa. 1823), the first major case concerning the clause, Justice Washington's list of fundamental rights, quoted by the Court in Baldwin v. Montana Fish & Game Commission, 436 U.S. 371, 384 (1978) includes professional pursuits.
>
> . . .
>
> **The right to practice law is a "fundamental right"** calling for scrutiny under the privileges and immunities clause." [197]

The Court analyzes whether the Bar's residency rule can withstand analysis under the privileges and immunities clause. It adopts the test delineated in *Hicklin v. Orbeck*, 437 U.S. 518, 524-526 (1978). In that case, the U.S. Supreme Court held that a state statute that discriminated against nonresidents in favor of residents was unconstitutional, even though the professed state interest in reducing unemployment was legitimate. Two reasons were given:

1. There was no substantial reason for discriminating between residents and nonresidents.
2. There was no substantial relationship between the means chosen by the state and the end to be achieved, i.e. the reduction of unemployment in Alaska.

Stated simply, the discrimination against nonresidents, did not bear a substantial relationship to the professed evil of high unemployment. The Alaska Court applies the ***Hicklin*** rule. It determines there must be a "substantial relationship" between the means chosen by the Bar (the residency requirement), and the legitimate objectives to be achieved. If the ***Hicklin*** rule is applied to assessment of an Applicant's moral character, the relevant issues could be presented in a variety of ways. Here are just five examples:

1. Does requiring a Bar Applicant to disclose virtually every single facet of their business and personal life, bear a substantial relationship to accomplishing the legitimate state objective that attorneys possess good moral character?

2. Does inquiry of a Bar Applicant's past, in a vague and ambiguous manner, bear a substantial relationship to accomplishing the legitimate state objective that attorneys possess good moral character, even though it results in the Bar not being subject to the same standards as other professions and businesses?

3. Does providing the State Bar Admissions Committee with virtually unchecked power to punish Applicants for their attitudes and beliefs about the Judiciary, bear a substantial relationship to accomplishing the legitimate state objective that attorneys possess good moral character and fitness?

4. Does formulating an admissions application that is so cumbersome, making it virtually impossible to answer every single question without making errors, mistakes, or omissions, bear a substantial relationship to accomplishing the legitimate state objective that attorneys possess good moral character?

5. **Does requiring a Bar Applicant to answer questions that are never again asked of licensed attorneys and Judges once admitted bear a substantial relationship to accomplishing the legitimate state objective that attorneys possess good moral character**?

I now provide the answers to the foregoing questions. No, No, No, No, and "Don't Be Ridiculous."

ARIZONA

539 P.2d 891 (1975)

OUR QUESTIONS ARE NOT VAGUE AND AMBIGUOUS. JUST DISCLOSE "ANY INCIDENT" BEARING ON YOUR CHARACTER AND FITNESS.

The Applicant did not register for the draft in 1964 when he turned 18. He did register in 1972 at age 26. He had three traffic citations, one for failing to have a front license plate, and two for running a red light. He was never convicted of any crime. In 1973 he filed his application. He was denied admission due to his delinquency in registering for the draft. The State Supreme Court affirmed.

This case depicts the application process at its' worst. Here you have a guy who corrects his primary deficiency prior to applying, has never been convicted of a crime and is still denied admission on character grounds. The Court bases its' decision not on his initial failure to register, but rather on the length of delay. The Court expressly indicates that not being convicted of a crime does not indicate one passes muster. It states:

> "Even an acquittal in a criminal action has been held not to be res judicata upon an inquiry to determine an applicant's character and fitness to become a member of the bar."

The Applicant testified at the Character Committee Hearing that when he first became of age he didn't realize he had a duty to register. He admitted that by age 19 he knew of the duty. He attributed his failure to the fact he was getting poor grades at Arizona State University, his father was strict, his dorm rent hadn't been paid and he was having personal problems. Stated simply, he was a kid having difficulty dealing with living on his own at college. It happens to many and is understandable. His father discovered that he was getting bad grades, and he left Arizona State to live at home, taking classes at Northern Arizona University. His grades improved immensely and he made the dean's list every semester. The Committee asked why he then didn't register. He responded as follows:

> "I'm not sure actually why I didn't, . . . I kept telling myself that I was going to do something about it, that I just wanted to get myself settled, that I just wanted to get some good grades here and to start doing things right. And then that I would do something about it . . . . I guess I emotionally wasn't quite ready to do anything about it yet. That's as good an answer as I can give."

I must now detract from discussion of this case. As I am writing this, I just remembered that I haven't had my car inspected yet. It's about six months overdue. I have a 1996 Honda Accord and I can't seem to find the time to get down to the inspection station. On the other hand, I'm already in the Bar, so it's not all that big of a concern. There's no pertinent question on the attorney license renewal forms I receive each year. Now back to the case (Then I have to get my car inspected).

After graduating, the Applicant attended graduate school at the University of Southern California. He then enrolled at the University of Arizona law school. During his second year of law school he spoke to the Dean about his draft registration problem. He testified that he was afraid if he registered at that time, he might be prosecuted. The Dean referred him to a lawyer in Tucson who did draft counseling (Not a particularly big business these days.) The lawyer asked if he was willing to

offer himself for induction in the army. The Applicant said he was reluctant, but would do so if it would avoid prosecution. Ultimately, he simply registered for the Draft and was never arrested or prosecuted. He then filed his Bar application.

The Court first focuses on his initial failure to disclose the draft registration issue. **The nondisclosure issue is particularly weak in this case, because no question on the application even made inquiry pertinent to registering for the draft**. Essentially, the Court was saying he should have volunteered information about an incident for which specific inquiry was never even made. Now here's where it gets great. Question 23 of the application read as follows:

> "Is there any other incident **in your career**, not hereinbefore referred to, having a bearing upon your character or fitness for admission to the bar?"

That is the question where the Committee irrationally asserted the draft issue should have been disclosed. The question's inherent vagueness, ambiguity, and overbreadth could not possibly be more apparent. What is the meaning of the phrase, "any other incident?" What determines if it bears upon your character? I submit that if the foregoing question is valid, then any individual who has ever been admitted to the Arizona Bar and left this question blank, has lied on their application. Here would be my own personal hypothetical answer to the question, which I present for purposes of demonstrating its' ridiculous nature.

> "Yes, there are other incidents not yet mentioned having a bearing upon my character and fitness.
>
> They are as follows:
>
> 1. When I was 18, I had sex with a girl I just met in a bar because we were both drunk and horny.
>
> 2. At a family holiday dinner when I was 19, I agreed to not eat any dessert until we finished the dinner. I then surreptitiously stole one cookie from my parent's refrigerator while no one was watching. No charges were ever filed.
>
> 3. When I was 30, I told a co-worker they looked fine, after being asked, although the co-worker looked terrible. I did this because I felt a person shouldn't be judged by their physical appearance. I didn't want to hurt the co-worker's feelings. Naturally, I realize my kindness may reflect negatively on a Bar application as being indicative of a lack of truthfulness.

Stated quite simply, Question 23 is nothing short of garbage. If allowed to withstand constitutional scrutiny, the Bar has an absolute blank check to conclude that any Applicant has lied. Every single person would have to file an answer at least 5000 pages in length to respond truthfully. The question's mere existence demonstrates the Bar's lack of candor. It is noteworthy that if Bar admission committee members left the question blank when they filed their own application, then applying their own standards, they lack the requisite candor to be a member of the Bar.

The Applicant brilliantly responded to the assertion that he should have disclosed the draft registration issue in an answer to Question 23 by asserting four points:

1. His attorney advised him that he could properly answer the question, "No."
2. At the time of making his application he had fulfilled his legal responsibilities.
3. His Selective Service Number had been disclosed elsewhere in the application and question 23 only requested information about items not "hereinbefore referred to."
4. The term "career" in the question applies to a profession, and he didn't actually have a profession at the time of filing the application.

I agree with the Applicant on all four points. The Committee and Court irrationally disagreed on all points. They were wrong. I am right. The Court's opinion closes by addressing the traffic citations. The Applicant had responded "No" to question 17(b) that read:

> "Have you ever been charged with, arrested, or questioned regarding violation of any law?"

The Applicant testified regarding his negative answer to question 17(b) as follows:

> "It was not anything that, that was important that I thought had any bearing whatsoever."
> . . .
> "I didn't think that the incident had a bearing on my character or fitness for admission to the bar." [198]

For those readers who believe the Applicant should be penalized for not disclosing three puny traffic citations that are considered "infractions," and are not legally "crimes," I pose the following question.

> Can you even remember every single traffic or parking ticket you have received in your life? If not, watch out for the Bar application that asks these questions. Your failure to list such traffic tickets may indicate you lack the requisite character and fitness to be an attorney. Concededly, lacking the requisite character to be an attorney may be the clearest proof in existence of good moral character.

614 P.2d 832 (1980)

CONDUCT YOU ENGAGED IN WHILE ONLY THREE WEEKS OLD AS A BABY, MAY REFLECT UPON YOUR CURRENT CHARACTER. WE NOW WANT TO KNOW ABOUT ANY INCIDENT IN YOUR LIFE, RATHER THAN JUST YOUR CAREER.

The Applicant sold marijuana, but stopped dealing because he felt it was inconsistent with his desire to become a lawyer. He considered marijuana illegal, but not immoral. In law school, he was chairman of the Appellate Advocacy Board and received an award for outstanding contribution to the law school. He filed his application in 1975 and was asked to meet with the Committee to discuss his involvement in selling marijuana. At the meeting, he denied the allegations. After being threatened with federal indictment, he withdrew his application. It appears he was never arrested or convicted of any crime. The Bar put the "squeeze" on him to encourage withdrawal of the application.

He also had not filed a federal income tax return under the mistaken belief that illegal profits from selling marijuana were not taxable. In 1979, he reapplied for admission. Several character witnesses testified on his behalf including Arizona attorneys and a Superior Court Judge. The State Supreme Court denied admission. It relied on the GAQ (Garbage Admission Question) discussed in the prior case which inquired:

> "Is there any other incident or occurrence **in your life**, which is not otherwise referred to in this application, which has a bearing, either directly or indirectly, upon your character or fitness for admission to the bar?"

The interesting aspect of this case is the revised nature of the GAQ (Garbage Admission Question). In 539 P.2d 891 (1975), the question had stated:

> "Is there any other incident **in your career**, not hereinbefore referred to, having a bearing upon your character or fitness for admission to the bar?"

The phrase "in your career" which that Applicant contested, had now been changed to "in your life." [199] Remember, the Court in the prior case rejected the Applicant's defense that he had no duty to disclose the draft registration issue because he was not yet in a "career." It is amusingly ironic and hypocritical that the Court after rejecting his argument, felt there was enough of a problem with the question to change its' scope from "career" to "life." Kind of a tacit confession on their part. It would appear that when the Court rejected his argument, they were not being entirely "candid," "open" and "truthful" regarding the question's validity. Perhaps this reflects on their moral character and ability to practice law. What makes matters worse is that the GAQ was now more ambiguous and vague. It now encompassed a person's whole life. It now imposed a duty to disclose details pertaining to all those things an Applicant did in grammar school, Kindergarten and while in nursery school.

See, you never should have caused a disturbance in that restaurant when you were three weeks old! Or taken a dump in your pants when you were eight months old. It could be determined to reflect negatively on your character and fitness to be an attorney. Truly and irrefutably, a GAQ (GARBAGE ADMISSION QUESTION).

618 P.2d 232 (1980)

FAILURE TO DISCLOSE THAT YOU HAVE BEEN THE SUBJECT OF A FAILED INVESTIGATION REFLECTS NEGATIVELY ON CHARACTER ?

The Applicant was admitted to the Illinois Bar in 1969 and practiced criminal defense law. On May 9, 1978 he applied to the Arizona Bar. He answered, "no" to the following question:

> "Have you ever either as a juvenile or adult been served with a criminal summons, questioned, arrested, taken into custody, indicted, charged with, tried for, pleaded guilty to or convicted of, or **ever been the subject of an investigation** concerning the violation of any felony or misdemeanor"?

In February, 1979 he executed a Statement of Material Changes in Application which stated as follows:

> "I, the undersigned, hereby certify to the Committee on Character and Fitness that as of the date of the beginning of the examination for admission, . . . there have been no material changes in or additions to the facts as shown by my answers to the Application for Admission which have occurred between the date of my filing the Application and the date of the examination . . ."

Several months earlier, the IRS had commenced an investigation of organized gambling in Arizona. A Special IRS Agent was assigned to engage in the practice of placing bets with a bookmaker. The Agent received a phone call from the person he understood was the bookmaker. He was told a person would approach him at a card game to collect on a bet. On May 9, 1978 (the exact date of the Bar application), the Agent was approached by the Applicant at the card game and gave him $ 550. A few months later, the IRS caused a search warrant to be issued of a sporting goods store in Phoenix. During the search, the Applicant arrived. He was informed that he was the subject of an investigation and read his Miranda rights. He was asked if he was admitted to practice law and he responded that although admitted in Illinois, he was not admitted in Arizona. He was neither arrested, nor detained. Two months later, a subpoena was issued to compel his appearance before a Grand Jury, but it was never served on him. After learning of its' existence, the Applicant telephoned the U.S. Attorney and informed him that if required to appear, he would assert his Fifth Amendment right against self-incrimination. The U.S. attorney responded that he need not appear. No indictments were issued and the Applicant heard nothing further from either the IRS or U.S. Attorney's office. He was never arrested, charged, indicted, or convicted of any crime.

Let's now recap where we are. The application question made inquiries that included whether the Applicant had ever been the "subject of an investigation." The Applicant answered "No" in May, 1978 which was a truthful statement. Between May, 1978 and February, 1979 he was informed that he had become the "subject of an investigation." He was however never arrested, charged, indicted or convicted of any crime. In February, 1979 after the Grand Jury failed to return any indictments, the Applicant executed a Statement of Material Changes in Application and indicated there were "None." The Bar asserted that in doing so he had lied during the application process. The issues raised are as follows:

1. Is an inquiry about whether an Applicant is a "subject of an investigation," a constitutionally valid Bar application question?

2. Have their been material changes in an application when after its' filing, an Applicant becomes the subject of an investigation which results in no charges, arrests, or indictments?

3. Assuming the inquiry into whether one has ever been the "subject of an investigation" is valid, and that commencement of such an investigation after the filing of a Bar application is material, is the failure to inform the Bar of such, grounds for denying admission?

A negative answer to any of the foregoing questions would mandate admission. The Court does not address any of the issues and simply denies admission. I will be a bit more diligent than the Arizona Supreme Court. I address the issues as follows:

1.) Inquiring into whether an Applicant has been the "subject of an investigation" is unconstitutionally vague and ambiguous for several reasons. First, it does not limit inquiry to investigations by law enforcement agencies. Rather instead it states:

> "ever been the subject of an investigation concerning the violation of any felony or misdemeanor"

Conceivably, the question imposes a duty to disclose facts pertaining to investigations by anyone, even casually. Informal casual inquiries by friends, co-workers and families would be included. Who has not been asked by friends or co-workers, "have you ever been convicted of a crime?" Does such casual inquiry constitute an investigation? What if they follow the question up with inquiries, such as "have you ever gotten really drunk?" Are they investigating into whether you've committed the crime of DWI? To have any possibility of surviving constitutional scrutiny, the question must be limited to investigations by law enforcement agencies.

2.) Assuming the question is constitutionally valid (which it is not), if the Applicant becomes the "subject of an investigation" after filing his application, the investigation would not constitute a "material" change unless it results in an arrest, charge, or conviction. Rationality mandates that materiality be gauged in the context of whether the specific facts could affect the ultimate decision on the application. It is difficult to perceive how the Bar justifies materiality regarding an investigation that results in no arrest, conviction, or charge. Stated simply, such an investigation reflects worse on the investigating agency than the person investigated. To accept the Bar's notion would mean that an individual who has done nothing wrong can be denied admission simply because some law enforcement agency thinks there is a possibility the person may have violated the law. The initiation of what ultimately proves to be a "failed investigation," is irrefutably not material.

3.) Assuming the inquiry into whether one has ever been the "subject of an investigation" is constitutionally valid (which it's not), and that disclosing the existence of a "failed investigation," initiated after filing the application is material (which it's not), nondisclosure is still not grounds for denying admission. It is admittedly unnecessary to explain a conclusion based on two clearly flawed assumptions, but the logic is simple. Nondisclosure of a material matter that does not result in an arrest, conviction, indictment or charge is not sufficient grounds to deny admission <u>if the nondisclosure is made without an "intent to deceive."</u> Even if the

nondisclosure is "material," then for the nondisclosure to reflect negatively on the Applicant's moral character it must have been done with an intent to deceive. If the Applicant demonstrates a good faith misunderstanding of a highly ambiguous and vague question, he should not be penalized.

The Arizona Supreme Court did not address the important legal issues. Instead, they were satisfied to adopt a logically flawed and irrational stance. The Applicant testified during the Bar hearings he would have asserted the Fifth Amendment privilege against self-incrimination, because he believed it was inappropriate to assert an Attorney-Client privilege due to the fact he was not a licensed Arizona attorney. He was irrefutably correct on this issue as a matter of law. The Court however, irrationally suggests, he should have asserted the attorney-client privilege even though he was not an Arizona attorney. They state:

> "It is apparent that rather than test the asserted attorney-client relationship before the Grand Jury, applicant preferred to deceive the United States District Attorney, thereby impeding the investigation into the asserted criminal activities of his two friends." [200]

The phrase "investigation into the asserted criminal activities of his two friends" is noteworthy. The Court is tacitly conceding that the Applicant was not even the "subject of the investigation." Such being the case, the Applicant irrefutably had no duty of disclosure.

555 P.2d 315 (1976)
680 P.2d 107 (1983)
686 F.2d 692 (1982)
466 U.S. 558 (1984)

BAR FIGHT OF THE CENTURY - A CASE THAT SMELLS BAD

The Ronwin Case

This case, or series of cases I should say, is classic. It depicts nothing short of the complete degeneration of the Bar admissions process. Undoubtedly, the Arizona Bar will never forget this Applicant. It is also a very sad case. The guy did make it to the U.S. Supreme Court though, where he lost in a narrow 4-3 decision with two justices not participating.

He was admitted to the Iowa Bar in 1974. He also took the Arizona Bar exam in January, 1974, but failed. He petitioned the Arizona Committee for re-grading of the exam and his request was denied. He then filed a petition with the Arizona Supreme Court that was denied and a Petition for Certiorari with the U.S. Supreme Court that was denied. At this point, he was irrefutably conducting himself appropriately. He was going right up the ladder with his grievance in the proper legal fashion. After losing at all levels, he requested to retake the exam in July, 1974. The trouble then escalates.

The Bar denies permission to sit for the July exam on character grounds. That smells bad. Here you have an Applicant who exercised his due process rights for review, and after losing simply wants to sit for the exam again. His character was not called into question when he sat for the January exam. Why all of the sudden deny character certification after he has petitioned for review? It gives the appearance that the Bar is trying to get even with a person who took them to Court. A so-called "mental fitness" hearing is held and the Committee concludes:

> "the applicant suffers from a "personality disorder" which . . . :
>
> (a) Causes him to be unreasonably suspicions that bad motives and intentions activate persons with whom he comes into contact and to unreasonably imagine that he is the object of unfair persecution by such persons and to act upon such imagined wrongs as if in fact sustained by known facts;
>
> (b) Causes him to make irresponsible and highly derogatory untrue public accusations and charges against persons in responsible positions which he knows or reasonably should know are without any factual basis or support;
>
> (c) Causes him to bring and pursue with great persistence groundless claims in court proceedings and otherwise even though he knows or should reasonably know such claims to be groundless, and that thereby others will be subjected to needless expense and concerns."

If certification of his character had been denied for the January, 1974 exam, I would be less inclined to demean the Committee's reckless and vindictive conclusions. Why was his character not an impediment to the January, 1974 exam, but became an impediment after he instituted appropriate legal action? The fact that he was during this same time admitted to the Iowa Bar which certified his character further weakens the Arizona Bar's position. The Applicant's suspicions far from being unreasonable, appear to have been very reasonable, rational and well-supported by the evidence. The Bar has motive to cause him trouble. He took them to Court. The Bar has opportunity. The character

review. The Applicant petitions the Arizona Supreme Court for review of the Committee's decision and then petitions the U.S. Supreme Court again which denies certiorari.

The origins of this case actually stem back further than 1974. While attending law school at Arizona State University he was harassed. Graffiti and ethnic slurs about him being Jewish were written on the bathroom stall and walls of the law school. In today's world, swift action would undoubtedly be taken. Such was not the case however in 1974. Ironically, the Court's opinion isn't even clear as to whether the Applicant was Jewish. The Applicant wrote a letter to the President of the University accusing the law school dean of expressing an "attitude of malice" toward him by failing to stop the graffiti. The letter stated:

> "the activities of the Dean *** sum to an astonishing and deliberate nonfeasance and malfeasance and were directly responsible for both my troubles at the school, which continued virtually unabated during my entire association, and for much of my current problems with the Bar"

Other comments in the letter were critical about a resident professor, two visiting professors and an acting dean of the law school. The acting dean was accused of deliberately soliciting memoranda containing derogatory comments about the Applicant and of bringing the memoranda to the Bar Committee's attention with the object of destroying his chances to be admitted to the Bar. The Arizona Supreme Court issued its' opinion in 1976. It irrationally denied admission on the purported ground that the Applicant was mentally unfit. The opinion first remarkably states that the practice of law is a Right and not a Privilege. This is remarkable because such a holding is directly adverse to the Court's ultimate conclusion. The Court states:

> **"The practice of law is not a privilege but a right,** conditioned solely upon the requirement that a person have the necessary mental, physical and moral qualifications. . . . This right is "**neither greater nor less than the right to engage in other occupations, business or trades**, for the right to seek and retain employment is shared by all equally and to be equal must be upon the same conditions."

In denigrating the Applicant's mental fitness, the Court declines to state specific facts or reasons, but instead relies on mere unsupported conclusions stating:

> "To survey in this opinion the allegations or criticisms made by various witnesses or the psychiatric and psychological testimony would unnecessarily inject comment on the character or reputation of persons other than the individual who is the focus of this case and would serve to heighten the extreme emotion with which the applicant and others view several of the incidents which were highlighted at the committee hearings. It would also discourage in the future the sort of candid and personal testimony which many people are naturally reluctant to give but which is necessary in order to make a competent evaluation of the applicant's qualifications."

Essentially, the Court's position is that to foster "candid" testimony, the content of such testimony must be kept secret. The most interesting aspect of the opinion concerns the Committee's finding (c) which stated in reference to the Applicant:

> "(c) Causes him to bring and pursue with great persistence groundless claims in court proceedings . . . even though he knows or should reasonably know such claims to be groundless, and that thereby others will be subjected to needless expense and concerns."

The foregoing was obviously adopted in response to his challenging the grading process through appropriate legal means. The Bar was trying to adopt an irrational standard that instituting a legal proceeding against the Bar constituted mental unfitness by an Applicant. The State Supreme Court properly recognized the danger of the Bar's position and at least facially rejected it, although in substance it clearly played a role in their decision. The Court states:

> "We do not agree with ground "(c)" of the Committee's Findings, that <Applicant> has in the past brought "with great persistence groundless claims in court proceedings and otherwise." We hesitate to fault the applicant for resorting to the legal system to express his grievances where, as in this case, there is credible evidence that the actions were brought with a good faith belief in their merit."

The Applicant then institutes suit in Federal Court. He alleges the Bar violated antitrust laws when grading the January, 1974 examination that he failed. Remember, there was no issue pertaining to his character when he took that exam. The character issues only came into play with the July exam. The crux of his argument is that if the January exam was graded in violation of federal law and he would have passed, then he would have been admitted. His attack on the grading procedure is predicated on the allegation that the Bar grades exams to admit a predetermined number of persons, without reference to achievement of a pre-set standard of competence, and for the purpose of restricting competition among attorneys. He is essentially asserting the existence of a quota system designed to keep the number of attorneys in a State at a low number.

Throughout his case in Federal Court there was apparently some friction between the Applicant and the Federal District Judge. He ultimately instituted suit against the Federal Judge. While his suit against the Bar was pending, he filed a Motion to Disqualify the Federal Judge on grounds including, but not limited to the following:

1. The Federal Judge was prejudiced against him because the judge was a defendant in an action brought by him.

2. The Federal Judge allegedly engaged in ex parte communications with defense counsel.

His Motion to Disqualify was denied and the Bar's Motion to Dismiss granted. Dismissal was predicated on the ground that the Bar's grading procedures were immune from federal antitrust laws due to state action exemption. The Bar argued that even assuming, arguendo, that the grading formula was anticompetitive, the Committee's status as a state agent renders its actions absolutely immune from antitrust liability.

The Applicant then appeals. And he wins!! The Federal Court of Appeals rules in his favor disagreeing with the Federal District Court Judge and the State Bar's position on the antitrust issue. The Federal Court of Appeals reasons that since there is no statute or Supreme Court rule requiring the challenged grading procedure, it is not covered by state action exemption. The District Court had also based its' dismissal on the Bar's assertion that the Applicant lacked Standing to sue the Bar. The Bar's position was that even if they committed an antitrust violation, it did not result in denial of admission because he was subsequently found mentally unfit. The Court of Appeals once again disagrees. It correctly reasons that since the Arizona Supreme Court didn't decide until later that the Applicant was mentally unfit; if he had passed the January, 1974 exam, conceivably he would have been admitted. Remember, his mental fitness became an issue in relation to the July exam, not the January exam. The Applicant comes out the big winner at the Court of Appeals, beating the Arizona Bar and State Supreme Court.

The case then goes to the U.S. Supreme Court which grants certiorari to review the Court of Appeals decision on the antitrust issue. It rules in favor of the Bar and against the Applicant in a narrow 4-3 decision with Justices O'Connor and Rehnquist not participating. Stevens, White and Blackmun join in a compelling dissent, while Powell, Burger, Marshall and Brennan issue a well-written majority opinion. The antitrust issue is admittedly difficult. The crux of the case at the U.S. Supreme Court is whether the Bar can claim immunity under the state action exemption from the Sherman Antitrust Act. The Supreme Court holds that the Bar is entitled to immunity and Ronwin's win at the Court of Appeals is nullified.

While the federal case was moving its way up from the District Court to the Court of Appeals, from 1977 - 1980, Ronwin applied for permission to take the Arizona exam numerous times and each application was denied. Arizona clearly did not want him admitted and would go to all irrational lengths to keep him out. What was previously characterized as his unreasonable suspicions were quite to the contrary, obviously very well-founded. He also continued petitioning the State Supreme Court for permission to take the exam. The Court finally ordered that he be permitted to take the 1982 exam, but reserved the issue of his character. He passed the July, 1982 exam. The Arizona Supreme Court then took the extraordinary step of considering the Applicant's character directly, rather than leaving it to the Bar Committee.

This is a very important fact. I believe it must be construed to mean that the State Supreme Court felt at least some of the Applicant's concerns about the Bar Committee were well-founded, and additionally they were afraid about the federal case headed for the U.S. Supreme Court. Certainly, the State Supreme Court was concerned about the fact that they lost in the Federal Court of Appeals. In any event, their extraordinary move displayed a marked lack of confidence in their own Bar Committee.

The Arizona Supreme Court first reaffirms that the practice of law is a Right, and not a Privilege. This continues to boggle me because while they continually concede it's a Right, they persist in treating it as a Privilege. Their inconsistency is evident in their statement that:

> "Each case must be judged on its own merits "and an ad hoc determination in each instance must be made by the court."

The Court focuses on numerous additional suits the Applicant instituted against the Bar, several judges and the Committee members, as well as numerous letters he wrote. It ultimately denies admission on character grounds. In reading the opinions involving this Applicant, the conclusion to be reached is quite clear. He was a man who was the subject of harassment during his law school years. In response, he attempted to remedy the injuries through appropriate legal means. The law school Dean turned a blind eye to the harassment and a good case could be made for the assertion that his Bar application was indeed sabotaged on character grounds by the Bar's elite.

Nevertheless, from 1974 until 1976 he seems to have maintained faith in the legal system, and went right up the ladder in proper professional and spirited fashion. This man I think truly believed at least initially and for some period of time thereafter, that the Arizona Supreme Court would ultimately do the right thing and where all others had failed, they would be fair and impartial. I think he believed they would realize he was a man seeking to right a terrible wrong. In his mind, he probably had faith the Arizona Supreme Court's decision on his initial application would wholly vindicate his position.

Once the Arizona Supreme Court denied that initial application, in a short, poorly written opinion that irrationally denigrated him with the groundless assertion that he was mentally unfit, they became the final link in what very well may have been a conspiracy to keep him out of the Bar. Upon realizing the Arizona Supreme Court would not have the courage to hold itself above the others, he then lost complete faith in the legal system. The sequence of events suggests his position had great merit. He went from faith tempered with reason and passion, to anger. He started suing everybody. This in no way suggests that his anger was not justified, because it appears that it probably was. Even

notwithstanding his justified anger, the Applicant persisted in utilizing proper legal recourse, albeit more than the Bar liked. The Bar on the other hand relied on deception, ex parte communications, covert conduct and the strength of their political position. The ultimate conclusion I reach is that the primary fault in this case lies with the Arizona Supreme Court, rather than the Bar Committee members. The State Supreme Court was supposed to hold itself above it all. Instead, they rendered an opinion based on what seemed at the time to be politically expedient.

The crux of this case lies in the one key fact asserted at the beginning. His character was not an issue when he took the January, 1974 exam. It only became an issue after he petitioned for re-grading and then petitioned the U.S. Supreme Court for certiorari. That smells bad. But it's certain the Arizona Bar will never forget this applicant. Particularly, since the case is still making them look bad 25 years later. [201]

ARKANSAS

839 S.W.2d 1 (1992)

THE ABILITY TO PRACTICE LAW IS A RIGHT, NOT A PRIVILEGE, BUT IT SHOULD BE TREATED LIKE A PRIVILEGE AND NOT A RIGHT?

The Applicant was denied admission based on two relapses to use of illegal drugs. Based on facts set forth in the opinion, he does not appear to have ever been convicted of any crime. He voluntarily entered into a drug treatment program prior to submitting his Bar application, and also entered Alcoholics Anonymous. There is no indication that he lied on his Bar application and he was totally free from drug use for more than two years, at the time the State Supreme Court wrote its opinion. The relapses apparently occurred prior to this two-year period. The Court recognizes the vagueness of moral character standards in its opinion stating:

> "Unfortunately for those who would like a black-letter rule, the concept of "good moral character" **escapes definition** in the abstract. Instead, a particular case must be judged on its own merits, and an **ad hoc** determination must be made by the court . . . . In the same vein, Supreme Court Justice Felix Frankfurter once remarked on the "**shadowy** rather than precise bounds" of the concept of "moral character."

The court also cites with approval *Konigsberg I*, and recognizes the danger of judging moral character utilizing vague standards. It also recognizes the ability to practice law is a Right, rather than a Privilege stating:

> "However, the Court declared, "the term, by itself, is **unusually ambiguous.** It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the **attitude,** experiences, and **prejudices** of the definer. Such a **vague** qualification, which is easily adapted to fit **personal views** and predilections, can be a **dangerous instrument** for **arbitrary** and **discriminatory denial** of the **right** to practice law."

After submission of appeal and oral argument, the Applicant filed a motion requesting that his medical records be sealed and that his identity in the case be anonymous. The Court denies the request stating:

> "Again, the issues in this case involve the protection of the public interest as well as *** fitness to practice law. We see nothing to be gained by shrouding his efforts to attain a law license in secrecy" [202]

In my view, since the Court denied admission, there was no reason to deny the request for anonymity. It furthered no public interest. Based on matters set forth in the opinion, I would admit this individual since he has no criminal convictions. Furthermore, even if he had one drug conviction (which does not appear to be the case), he was voluntarily participating in a treatment program and was drug free for more than two years. The Court recognizes the problem associated with judging moral character using vague standards. It recognizes that the ability to practice law is a Right, rather than a Privilege, but then substantively treats it like a Privilege to be denied using an irrational, arbitrary analysis.

894 S.W.2d 906 (1995)

> *RULE ARE RULES. UNLESS OF COURSE THEY DON'T WORK IN FAVOR OF THE BAR, THEN THEY'RE REALLY NOT RULES.*
>
> *THE ABILITY TO PRACTICE LAW ISN'T REALLY A RIGHT. IT'S JUST A CLAIM OF ENTITLEMENT. WE DIDN'T MEAN WHAT WE SAID IN 839 S.W. 2d. 1 (1992).*
>
> *SINCE WE'VE BEEN TREATING THE ABILITY TO PRACTICE LAW LIKE A PRIVILEGE ALL ALONG, WE'LL CALL IT A PRIVILEGE FROM NOW ON.*

The Applicant is denied admission. In 1973, at age 18 he pled guilty to possession of an illegal drug and was placed on 18 months probation. After 7 months, apparently based on a plea bargain, the charge was dismissed. In 1984, at age 29 he pled guilty to possession of marijuana with intent to deliver (he was growing marijuana plants) and was sentenced to 4 years in prison. The sentence was suspended and he was placed on probation. At age 31, he was charged with felony manufacture of a controlled substance. He was found guilty of the lesser offense of possession, a misdemeanor and sentenced to one year in prison. The conviction was expunged in 1991.

The Bar Board determined that by continuing to profess his innocence, the Applicant was not being truthful. On the Bar application, he disclosed the convictions. The 1986 misdemeanor conviction had been expunged, and eleven years had lapsed since his last un-expunged conviction. After his release from prison he completed his bachelor's degree with high honors in two years and nine months. He submitted to the Bar numerous letters of recommendations from friends, teachers and relatives attesting to his honesty and trustworthiness.

The Applicant raised numerous legal challenges to the admissions process. **He asserted that the Board violated his right to equal protection by impermissibly classifying him apart from other applicants with criminal records who have been admitted.** The Arkansas Supreme Court evaded ruling on this issue on the procedural ground that it was presented in his Reply Brief rather than his Opening Brief. He also asserted that the Board restricted his access to a hearing and caused undue delay in the disposition of his case by declining to further process his application until he posted a bond. The Court rejected this argument on the ground that since the ability to practice law is not a fundamental right, U.S. Supreme Court opinions that prohibit restricting access to courts for indigents by imposing a fee do not apply. He also asserted that the Board did not afford him procedural due process because it applied a Bar rule to his initial application that was intended for reinstatement cases. The Court rejects this argument on the ground he was not prejudiced by such.

Although the Court rejected his procedural due process argument that the Bar incorrectly applied a Rule intended for reinstatement cases to an initial admissions case, the opinion notes that the Rule in question had since been amended to include initial applications. This irrefutably confirms in my mind that the Rule should not have been applied to the Applicant. It is disturbing that the Court failed to consider his Equal Protection Clause challenge on the ground that he did not strictly follow procedure, yet allowed the Bar's interpretation of a procedurally defective rule to pass muster. The Bar was less prejudiced by his Equal Protection challenge being presented in a Reply Brief, than he was by the Bar's improper application of a Rule which was not intended for initial applications. Essentially the Court's opinion stands for the premise that the rules of procedure will be applied strictly to the Applicant, and leniently to the Bar. That is a logically defective double standard. In reference to the ability to practice law being a Right, the Court states as follows:

> "An applicant who satisfies the statutory prerequisites for admission to the bar has a **"legitimate claim of entitlement"** to practice his profession. . . . In its decisions concerning the constitutionality of filing fees, the Supreme Court has held that when a fundamental right is involved, a fee cannot restrict an indigent person's access to the courts. *Boddie v. Connecticut*, 401 U.S. 371 (1971). However, where a fundamental right is not involved, such fees do not violate due process, especially if alternatives are available for the vindication of the indigent's rights. *United States v. Kras*, 409 U.S. 437, (1973). . . . We have been cited to no authority for the proposition that one may have a **"fundamental right**" to practice law. [203]

I would admit this Applicant. The convictions do not reflect on his honesty or trustworthiness. The 1986 misdemeanor conviction should not even be considered since it was expunged. Over 11 years had lapsed since the 1984 conviction. To the extent the Bar adopted the irrational stance that his continued assertions of innocence reflect upon his truthfulness, they are on extraordinarily weak ground. It is a clear example of the "pot calling the kettle black." The greater concern is whether the Bar was candid and truthful throughout consideration of his application. They improperly applied a procedurally defective rule designed for reinstatement proceedings to an initial application. They essentially adopted a stance of "we didn't really mean what we expressly said." This reflects adversely on the candor of the Admissions Committee and may indicate they lack the requisite moral character to practice law. There is little doubt in my mind that if this Applicant had not challenged the Bar's procedures during the application process, he probably would have been admitted. The Bar appears to have been getting back him for making them look stupid. The revised Rule adopted by the Supreme Court of Arkansas included the following statement:

"The practice of law is a privilege."

In *839 S.W. 2d 1*(1992), the Arkansas Supreme Court had quoted *Konigsberg I*, for the premise that the ability to practice law was a "Right." In this case, they retreated from that determination and falsely labeled it a "legitimate claim of entitlement," rather than a "fundamental right." The new rule expressly classified it as a Privilege. That's how they were treating it all along anyway. Apparently, once the Applicant made the Arkansas Bar look stupid, the Arkansas Supreme Court no longer felt they should abide by the premises of *Konigsberg I* delineated by the U.S. Supreme Court.

No. 98-369, ; 1998 AR. 42039 (VERUSLAW)

IF YOU SAY YOU'RE INNOCENT, IT'S WORSE THAN BEING GUILTY.

The Applicant had never been convicted of any crime. He is denied admission based on facts surrounding suspension of his dental license, his explanation of such at the Bar hearing and alleged fiscal irresponsibility. He allegedly billed an insurance company for dental services not rendered and accepted a 120-day license suspension. He then allegedly practiced dentistry while his license was suspended. He answered "No" to a Bar application question inquiring if he had ever been accused of fraud. In responding to an inquiry whether he had ever applied for a license (other than to become an attorney), that required good moral character or examination, he did not disclose that he had applied for a Series 7, Securities license. In the Series 7, Securities License application, he responded "No" to a question inquiring if he ever made a "false statement or omission or been dishonest, unfair or unethical."

He had relied on advice and counsel of Arkansas attorneys representing him with respect to the services he rendered that were alleged to constitute the unlawful practice of dentistry. Such Counsel had approved his plans for operating another dentist's office during the suspension period. He continued to claim he was innocent of unlawfully practicing dentistry, but could not contest the allegations because he lacked the finances to defend himself. Substantially all facts pertaining to denial of his admission relate to his allegedly billing an insurance company for services that were not rendered in 1988 and 1989. That was nine years prior to the Court's decision on his admission. During the Bar Hearings, he apparently retracted his prior admission of guilt before the Dental Board. His assertion of innocence was held against him by the Court which cites a Florida case for the following premise:

> "An applicant's "continued denial" of an act for which he or she has been found guilty or sanctioned "does not serve the applicant well" in bar-admission proceedings and is, in fact, "unacceptable." *709 So.2d at 1381.*

My conclusions are as follows. If he truly perpetuated a fraud upon the insurance company by billing for services not rendered, then he should have been prosecuted. In the absence of prosecution and a conviction, it is inequitable to deprive him of a law license. The fact that he admitted to the Dental Board that he billed the insurance company improperly, admittedly causes some concern. There are however many possible reasons, which would not constitute criminal conduct. The improper billing may have been attributable to a series of errors. The opinion does not state that he admitted billing the insurance company "fraudulently," but rather instead "for services not rendered." It is possible he was only admitting to billing errors, rather than fraud.

He may have merely used incorrect medical billing codes, resulting in billing for services not rendered, and not billing for services actually rendered. There are too many unknowns to treat this as a crime. The fact that he was never prosecuted is the main point in his favor and greatly bolsters the likelihood that the faulty billing was not criminal in nature. Regarding his purported nondisclosures, they should be deemed immaterial since even if he had provided the information, constitutional principles mandate that he be admitted to the Bar. This is because in the absence of making similar inquiries regularly and periodically of all members of the Bar, they are constitutionally infirm questions. They treat Nonattorney Applicants in a manner dissimilar from licensed attorneys. It is irrelevant whether one has ever been "accused of fraud." It is prosecutions, convictions or acquittals that from a legal perspective are determinative of whether one committed acts they are accused of.

While I do have some concern pertaining to his confession to the Dental Board, I have greater concern with the fact that the Court and Bar are amenable to treating his assertions of innocence as evidence corroborating an allegation of untruthfulness. The day when one is considered to be essentially committing perjury by claiming they are innocent, is the day the Courts rule by force and coercion, rather than the rule of law. [204]

CALIFORNIA

496 P.2d 1264 (1972)

WE ADMIT WE'VE BEEN SCREWING UP FOR A LOT OF YEARS. SO LET'S JUST MAKE IT RIGHT NOW.

This case did not deal directly with the issue of an Applicant's character, but does contain related information. The Applicant was denied admission on the sole ground he was not a U.S. citizen. Ruling in his favor, the California Supreme Court states:

"The question for decision, accordingly, is whether the statutory exclusion of aliens from the practice of law in this state . . . constitutes a denial of equal protection of the law. . . . It is the **lingering vestige of a xenophobic attitude which, as we shall see, also once restricted membership in our bar to persons who were both "male" and "white."** It should now be allowed to join those anachronistic classifications among the crumbled pedestals of history.

. . .

And in Konigsberg the court reiterated . . . that "We recognize the importance of leaving States free to select their own bars, but **it is equally important that the State not exercise this power in an arbitrary or discriminatory manner** . . . . A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal."

. . .

The first statute regulating the practice of law in California limited membership in the bar to those who were (1) white, (2) male, and (3) citizens. (Stats. 1851, ch. 4, p. 48) The first two qualifications remained the law of this state for a quarter of a century: several times reaffirmed by the Legislature . . . . It was not until 1877 that the total exclusion of nonwhites and women was abandoned. . . .

Beginning in 1861, by contrast, an applicant for admission to the bar was not required to be a citizen: an alien was also eligible . . . .

. . . This situation prevailed in California until 1931, when the State Bar Act was amended to restrict membership, as in the early years of our statehood, to United States citizens."

. . .

Second, the theory that the practice of law is a privilege and not a right--which has been invoked in the past to justify various legislative regulations of the profession . . . was seriously questioned by the Supreme Court in Schware v. Board of Bar Examiners (1957) . . . . "Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. **Certainly the practice of law is not a matter of the State's grace. Ex Parte Garland,** 4 Wall. 333, 379." Respondent seeks to minimize the effect of this language by asserting that it had "no apparent significance" in Schware and was there relegated to a footnote. But in Hallinan v. Committee of Bar Examiners . . . this court relied on prior opinions which "characterize a claim for admission to the bar as a claim of right entitled to the protections of procedural due process," and concluded it was "impossible for us to regard admission to the profession as a mere privilege." **And the Schware footnote was squarely elevated to a textual holding in Baird v. State Bar of Arizona, 401 U.S. 1 (1971) . . . when the Supreme Court said, citing Schware and Garland :**

"The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character." . . . Manifestly we cannot undertake to exhume legal theories so freshly and firmly buried."

Footnote 2 of the opinion states:

> "At the national level, alien attorneys were significant figures on the legal scene throughout at least the first half of our history: as the United States Supreme Court observed in Bradwell v. The State (1872) . . . "Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State." [205]

The Court's opinion specified three critical points:

1. Aliens were prohibited from becoming attorneys in California from 1851-1861. They were permitted to be attorneys apparently from 1861-1931. They were then prohibited again from 1931-1972, the date of this opinion. As explained earlier in this book, 1931 was the year the NCBE began taking control of the admissions process. Their purpose was to exclude those considered by the Bar to not be "worthy." Specifically, they meant to exclude immigrants.

2. The U.S. Supreme Court in 1957 and 1971 reaffirmed its position that the ability for a qualified individual to practice law was a "Right" and not a "Privilege." Notwithstanding, there were numerous state court opinions incorrectly asserting it was a "Privilege." In doing so, it is irrefutable that the state courts were usurping the power and authority of the United States Supreme Court, in the face of *Schware* and *Baird*.

3. The *Schware* footnote indicating that the ability to engage in the practice of law was a "Right," which was predicated on the U.S. Supreme Court's holding in *Ex Parte Garland* was squarely elevated to a textual holding in *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

YOU MISUNDERSTOOD ME. WHEN I SAID "WE HAVE TO BE A LOT HEAVIER ABOUT THE KIND OF VIOLENCE THAT WE'RE GOING TO PERPETRATE" I WAS TRYING TO IMPRESS UPON THE CROWD THE NEED FOR APPROPRIATE LEGAL ACTION.

The Applicant was a student civil rights leader during the late 1960s and participated in numerous protests where he gave what were at a minimum "passionate" speeches. A bit of background on his early years is relevant. Prior to high school, he was active in the Boy Scouts and attained the rank of Life Scout. He graduated second in his high school class in New York, was elected to the National Honor Society and received several scholarships. While in college he worked as a volunteer at a YWCA sponsored project in North Carolina involved in voter registration and surveying social needs of the black community. He also worked as a counselor in a home for delinquent teenagers sponsored by the Lutheran Church. He graduated magna cum laude from college and was awarded department honors from the religion department. He entered a competition sponsored by the Wall Street Journal and was one of 50 persons selected in the nation to win a fellowship. He was offered law scholarships from several schools and chose the University of California. Following graduation he was awarded a Reginald Heber Smith Community Law Fellowship for work with the Legal Aid Society of Alameda County. While in law school, he became active in the Boalt Hall Community Assistance Program and was head of the Boalt Hall chapter of the Law Students Civil Rights Research Council. He was elected to the position of Student Advocate of the Associated Students and awarded a fellowship by the Law Students Civil Rights Research Council. In the spring of 1969 he was elected to the Presidency of the Associated Students of the University of California.

The California Bar Committee concluded he lacked the requisite moral character on the ground that he lied during the admissions process. The manner in which they asserted he lied was attributable to how he explained the meaning of statements he made in three speeches delivered in 1969 and 1970. The Committee concluded as follows:

> "Applicant intentionally lied to the Subcommittee and to the Committee by testifying under oath that he had never advocated violence or violent conduct."

The issue of dispute was the meaning of the words he spoke. This case demonstrates how the skillful "parsing" of words can be effectively utilized by either side. The Applicant admitted saying certain things, but it was his position that the Committee was misinterpreting them. Here are examples of two of his speeches and his explanations.

CONTENT OF APPLICANT'S PUBLIC SPEECH May 15, 1969:

> "Now, we have not yet decided exactly what we are going to do. But there are some plans, I have a suggestion, let's go down to the People's Park, because we are the people. . . . If we are to win this thing, it is because we are making it more costly for the University to put up its fence, than it is for them to take down their fence. What we have to do then, is maximize the cost to them, minimize the cost to us. So what that means, is people be careful. Don't let those pigs beat the (****) out of you, don't let yourself get arrested on felonies, go down there and take the park."

APPLICANT'S EXPLANATION OF May 15, 1969 Speech at Bar Hearing:

> The Applicant testified at the Bar Hearing that the language in the above speech was not a call to any particular action except as it urged the crowd to move to the location of the park and peacefully demonstrate its opposition to the action taken by the university. He asserted the phrase "go down there and take the park" was not a call to violence, but a call to undertake the first phase of an ongoing demonstration of public disapproval.

CONTENT OF APPLICANT'S PUBLIC SPEECH March 6, 1970:

> "I like to call this stage, give them a little (****) for the (****) they are giving us. That's what's been going on. That's what started in Berkley when we had our first insurrection in the summer of 1968. That's what happened down in Santa Barbara in the last couple of weeks. It's called the, give them a little (****) for the (****) they give us. And, brothers and sisters, I am not going to get up here and tell you that in this society nonviolence is the way, because that's (****), we know that. But just at the same time I am not going to tell you that nonviolence is the way and we should avoid violence because it is bad or something like that, I am going to tell you this, that we have to be, as time goes on, as the (****) comes down heavier and heavier in Babylon, we have to be a lot heavier about the kind of violence that we're going to perpetrate. We are going to have to talk about violence, if it's violence, the question is not nonviolence vs. violence, the question is when violence, and how violence and what violence, because, that is to say that to some of the people, some people think that any kind of violence is groovy and that goes along with the philosophy, give them (****) for giving us (****), which is the only philosophy we have. But I will say this, that the kind of oppression that is coming down in this country right now, we will have to do a little bit more thinking, a little bit more getting ourselves together. . . ."

APPLICANT'S EXPLANATION OF March 6, 1970 Speech at Bar Hearing:

> The Applicant testified that the thrust and intention of the above speech, viewed as a whole, was to persuade his audience of the inefficiency of random violence as a response to their grievances and urge them to join him in massive political action within the context of the electoral system; that remarks made in the course of the speech indicating that violence was a permissible alternative mode of action were made purely for the purpose of establishing rapport with the audience in order to render them amenable to persuasion; and that the result of the speech was not violence but on the other hand was the type of political action which petitioner advocated.

The Supreme Court of California rules in his favor and orders that he be certified for admission. In order to address the Character Committee's assertion that he lied, the Court has to determine what constitutes a "lie." The conclusion reached by the Court is as follows:

> "To lie is "to make an untrue statement with intent to deceive." . . . Thus, the determination of whether a lie has been told comprehends an analysis having two aspects; (1) an objective aspect, which is concerned with whether an "untrue statement" has been made, and (2) a subjective aspect, which is concerned with the intent or state of mind of the person who utters such a statement."

The Court notes that the Committee did not find that the Applicant lacked good moral character because he advocated violence, but instead because he lied by testifying that he had never advocated violence. The Court then details how it will proceed. In order to rule in his favor, the Court must reach one of the following two conclusions:

1. There exists a reasonable basis for determining the speeches did not advocate violence
2. Even if there is no such reasonable basis, the Applicant lacked any intent to deceive when he testified that the speeches did not advocate violence.

The Court never fully addresses the second issue, because it rules in his favor on the first. The Court incredibly determines that there is a reasonable basis for concluding the speeches did not advocate violence. The Court supports its determination by relying on the following two points:

1. Criminal proceedings initiated against the Applicant as a result of the speeches were concluded in his favor.
2. The Applicant's testimony before the Committee that the speeches did not advocate violence is not wholly lacking in rational integrity. [206]

The Applicant wins and his admission to the Bar is certified. The conclusion I reach in this case is straightforward. If you have significant public and political support, you are exempt from the Bar admission character analysis. The fact that this Applicant was never convicted of a crime would alone incline me to grant admission. Nevertheless, if the State Supreme Court is not going to adopt such a bright line rule for everyone, this case demonstrates a blatant inconsistency in the review process. Here you have a man, who I believe was irrefutably advocating the use of violence in his speeches. He is admitted, while other Applicants are denied admission for unpaid credit card debts, undisclosed parking tickets, a "cavalier" attitude, or institution of civil suits.

As stated above, I would admit the Applicant. But I would admit him because he has never been convicted of a crime. Not through utilization of a warped twisting of logic and manipulative parsing of words that results an absurd interpretation of words spoken. The Court's analysis of what constitutes a "lie" is sound. The Court's application of the elements is unsound. More importantly, there is no consistency in application of the rule for other Applicants. Instead with most Applicants, a "lie" is deemed to exist not only based on innocent misstatements of fact, but even nondisclosures. Rather instead, the proper requisite elements of materiality and intent to deceive must be uniformly applied. Lack of uniformity breeds favoritism and inappropriate deference to privilege.

The rule left by this case is as follows. Lies are not lies to the State Supreme Courts, when told by those with massive public support, those who have Judges as friends, or when spoken by State Bars to further the economic self-interests of the legal profession. Statements that cannot reasonably be construed as "lies" however are quickly classified as such, when innocence, mistake, inadvertence or omission is professed by those who are weak or stand alone. That is why you need a clear bright line rule to determine who meets the moral character qualifications. A rule applied equally to Nonattorney Bar Applicants and licensed attorneys. A rule applied equally and periodically to both. A rule that does not require a Nonattorney Bar Applicant to disclose information that is not regularly and periodically required to be disclosed by licensed attorneys.

602 P.2d 768 (1979)

IF YOU DON'T LIKE THE RECORD, JUST SAY IT MEANS SOMETHING ELSE.

The Applicant in this case is ordered to be certified for admission by the State Supreme Court after the Bar rules against him. The Bar denied admission on the ground that he failed to demonstrate adequate "remorse" for conduct in managing an employment agency between 1972-1974. He had been disciplined by the State Bureau of Employment Agencies for engaging in unethical fee collection practices. Specifically, the Applicant made numerous phone calls to debtors and urged their employers to pressure them or discharge them for failing to pay their debts. Also, the Bureau alleged that he improperly solicited a fee from a client for obtaining a job that his agency did not even have a job order for. In addition, the Bureau alleged that he failed to disburse a refund to a client who had left a job for just cause, as required by California law.

The Applicant was never convicted of a crime or arrested based on the Court's opinion. He had a distinguished Air Force record, including award of the Air Medal with five oak leaf clusters for participation in 35 World War II combat missions. He was honorably discharged. He was a good husband and father of 5 children. He was 59 years old. Two character witnesses including an officer of a San Diego bank and private investigator testified that he was hardworking, industrious, straightforward, honest and sticks up for what he believes. During the Bar proceedings, he refused to retract his claims of innocence. That was determined to be a negative factor by the Bar's Character Committee, but a positive factor by the State Supreme Court.

The Court rules in his favor. It determines there is support for his claim that the Employment Bureau's proceedings were tainted by the bias of its investigator. The Court further determines that the misconduct described by the Bureau was less serious than ethical breaches which have confronted the Court, in cases involving other Applicants refused certification. The Court states as follows in reference to **514 P.2d 967** discussed previously:

> "Most recently, we rejected the Committee's finding that an applicant "lied" to it by giving "evasive answers" and "incredible and unbelievable explanations" regarding his statements in political speeches. . . . The Committee, we held, may conclude that an applicant lied in testifying to the meaning of his previous utterances only where the Committee finds "beyond any reasonable doubt" that the applicant's version is both objectively false and advanced with an intent to deceive the Committee."

Regarding his persistence in continuing to profess innocence, rather than expressing remorse, the Court states:

> ". . . refusal to retract his claims of innocence and make a showing of repentance appears to reinforce rather than undercut his showing of good character.
> . . .
> **An individual's courageous adherence to his beliefs, in the face of a judicial or quasi-judicial decision attacking their soundness, may prove his fitness to practice law rather than the contrary**."

Footnote 2 of the opinion states:

> "The subcommittee findings adopted by the Committee referred to several matters which we do not discuss in the text because we find them relatively insignificant: (1) . . . has been a party to five lawsuits, and would not admit wrongdoing as to those lawsuits . . . (2) . . . testimony

> concerning his dismissal from his job as a flight engineer with United Airlines as indicating his belief "that apparently a conspiracy existed against him with a fellow flight employee lying against him." . . . Neither the portions of the record cited by the Committee in support of that finding nor the record as a whole reveal the use of such language . . .; his application states that a flight manager who incorrectly advised him regarding a licensing procedure later denied giving such advice . . . ."

Footnote 19 quotes the Applicant's testimony before the Committee as follows:

> "Why should I have remorse when I didn't do those things I was accused of. That sounds like the person who was framed and railroaded to prison for several years, (then denied) parole . . . because he no remorse."

I believe the Court did an exceptionally good job in this case. The Bar Committee had egg on its' face as evidenced by the Court's statement that:

> "Neither the portions of the record cited by the Committee in support of that finding nor the record as a whole reveal the use of such language . . ." [207]

Why did the Committee mischaracterize the Applicant's statements? Why weren't they candid and truthful? Applying their own standards in the manner they do, it would appear to indicate they lacked candor during the admissions process. Such demonstrates that they lack the requisite moral character to engage in the practice of law.

666 P.2d 10 (1983)

WE RULE IN FAVOR OF THE APPLICANT, BUT WE'LL LET THE COMMITTEE DO WHATEVER IT WANTS ANYWAY.

DON'T ASK US TO TELL YOU WHY THE APPLICANT IS DENIED CERTIFICATION. HE JUST IS BECAUSE WE SAY SO.

The Committee denied certification on the general ground that the Applicant lacked good moral character. It did not however, make any specific findings or provide support for its conclusion. The issues focused around the fact that he had represented himself to be an attorney before a trial judge during the course of a pro se litigation. The Judge asked for his Bar card and he then admitted that he wasn't licensed. He was sentenced to four days in jail for contempt. In 1976, he signed the name of one of his law professors to legal documents falsely claiming he had the law professor's permission. The law professor testified that he did not consent to the use of his name. In 1977, he filed an answer in a litigation listing another attorney as attorney of record, and signed her name to the answer without consent.

During the admission proceedings, he admitted he made serious mistakes in judgment, and that it was wrong for him to have held himself out as a lawyer. Subsequent to the above incidents he had not engaged in any activity constituting the unauthorized practice of law. The Court rules in his favor on the basis he admitted wrongdoing, had not engaged in further wrongdoing since the above incidents and expressed remorse.

The Court's opinion is defective in two ways. First, although the Court rules in his favor, it gives the Committee two options. The Committee is given the option to either hold further hearings or admit the Applicant. Since the Court ruled in his favor, they should have Ordered certification. Instead, they gave the Bar an option of certifying or holding further hearings. The Applicant was right back where he started, even though he won. Once he goes through the lengthy and costly process of an appeal, fairness mandates that the Court render a conclusive decision. This Applicant is again at the mercy of his future competitors. It is a situation custom built for the Committee that rejected him, to now squeeze him. Essentially, "be nice to us, and we'll certify, but otherwise we'll hold more hearings." That's garbage.

Secondly, the Court should have slammed the Committee hard, for not adopting specific findings of fact. The Committee concluded he lacked good moral character, but did not say why. That is absolutely unacceptable.

I would admit the Applicant, but do so with some hesitation. The fact that he engaged in what is called the "unauthorized practice of law" does not concern me particularly because most UPL prohibitions are anticompetitive, vague, and suffer from overbreadth. The fact however, that he signed the names of other attorneys is wholly inexcusable and I believe possibly criminal in nature. Nevertheless, since he was not prosecuted, I am reluctant to hold it against him. Frankly speaking, if he did commit the act, then he should have been prosecuted. But in the absence of prosecution and conviction, I am unwilling to conclude it justifies denial of admission. The facts surrounding representing himself to a Judge as an attorney and being held in contempt are not of serious concern to me. It was wrong, but he paid the price by spending four days in jail. Also, the fact that he did it in the course of representing himself, rather than representing someone else, moderately reduces the seriousness. It was wrong no doubt, but not sufficiently serious to warrant denial of admission. My biggest concern in the case is with the Bar's failure to adopt specific Findings. The necessity of supporting denial of character certification with Findings is fundamental to procedural due process. I would be tempted to admit virtually any Applicant if specific Findings are not adopted by the Bar. Stated quite simply, in the absence of Findings, the denial should be deemed ineffective. The Bar

should not be allowed to circumvent basic and fundamental constitutional requirements in such an egregious manner. [208]

158 Cal. App. 3d 497 (1984)

IT'S ALRIGHT FOR US AT THE BAR TO ENGAGE IN DECEPTION

The Applicant instituted suit against members of the Bar's character committee. He passed the February, 1982 Bar exam, but was notified certification would be delayed pending a moral character investigation. A Hearing was set for January, 1983. He learned that an individual he was suing in an unrelated case, was communicating with a Bar admissions official in charge of the character investigation. The Applicant served that individual with a notice of deposition for the January hearing. The Bar wanting to protect its' informant from giving a deposition, and "evaded" the process by canceling the January hearing.

In May, 1983 the Applicant discovered frequent contacts were being maintained between the informant and the Bar admissions official. The Applicant asserted that the Bar was conspiring with the individual to deny his certification in retaliation for the unrelated lawsuit. He further alleged that such conduct violated the Civil Rights Act and deprived him of rights guaranteed by the Constitution. The trial court dismissed his case and the appellate court affirmed dismissal on the ground that the acts of Bar committee members, were entitled to absolute quasi-judicial immunity. Essentially, the Court was saying that even if the Bar Committee did what the Applicant says they did, they were immune from liability under the Civil Rights Act.

I introduce this case not for the purpose of analyzing the validity or invalidity of judicial immunity which is beyond the scope of this book, but solely for the purpose of commenting on the Bar's cancellation of the January character Hearing. It demonstrates how the admissions process is used by parties in litigation for purposes of leverage. That is wrong. All one needs to do when litigating against an individual who is in the process of applying to the Bar is submit a character complaint and no matter how groundless it may be, admission is delayed indefinitely. It is particularly saddening that the Bar intentionally frustrated this Applicant's legitimate right to obtain a deposition by canceling the Hearing. It is also sad that the Bar was not candid with the Applicant regarding the communications it had been receiving. Applying their own standards, this reflects poorly on their character. [209]

741 P.2d 1138 (1987)

WE JUST CAN'T SEEM TO GET THIS FINDINGS OF FACT ISSUE RIGHT

The Applicant practiced as a licensed private investigator for 10 years in California without a single charge of misconduct. He was never charged with or convicted of any crime. Letters of recommendation were submitted on his behalf by five judges, fourteen attorneys and one medical doctor. The Bar denied admission for the following reasons.

In 1974, he counseled a murder witness on how to avoid a subpoena. From 1969-1977, as a California Highway Patrol officer and later as a private investigator he allegedly engaged in inaccurate record-keeping, improper collection and storage of evidence and suspect loan practices.

In 1984, he was hired by an attorney to assist in a child custody dispute. The mother had illegally removed the child, in violation of a valid Canadian Court Order. The Applicant assisted the father with a legal retaking of the child by force. He also did not inform one of his character witnesses that supported his admission to the Bar of the facts and circumstances surrounding an earlier denial of admission to the Bar.

The State Supreme Court rules in his favor, noting that most of the alleged misconduct was at least 10 years old. It concludes that its value in determining present moral character is diminished significantly by its age. The Bar argued that the child custody matter in 1984 demonstrated a lack of rehabilitation. The Applicant countered that the incident facilitated reunification of a father and his child pursuant to a valid court order. The Court notes that prior to the incident, the father's attorney contacted the Sacramento County District Attorney's office to confirm the legality of the proposed taking. Although the attorney ultimately received an angry letter from the mother's attorney, with a copy sent to the State Bar, the Bar initiated no disciplinary proceedings against the attorney who developed the child recovery plan. The Court does not condone what the Applicant did, but emphasized it was accomplished pursuant to a valid Court order.

The most interesting aspect of the opinion addresses an impropriety committed by the Bar. The Applicant had been denied admission to the California Bar in 1982. In 1984 he reapplied, which became the subject of the case at hand. When notifying the Applicant of the character Hearing the Committee's notice identified the subject of inquiry as follows:

> "The purpose of the hearing is to allow you to present evidence of your rehabilitation **since the denial of certification in July 1982**, to examine your conduct **since that date**, and to inquire into any litigation in which you have been involved, including family law matters such as dissolution and child support."

Prior to the Hearing, the Committee's principal referee confirmed that:

> **"Direct evidence will not be taken from second parties as to matters found by the Committee of Bar Examiners in their July 12, 1982 decision**, **unless** in examination of applicant, the State Bar Examiner **specifically** opens up questions in addition to whether applicant is now telling the truth"

Essentially, the gist appeared to be that only conduct from 1982 - 1985 would be the subject of the Hearing. At least that's what the Notice indicated. But the Committee wasn't candid and truthful. What happened is as follows. The Hearing Panel issued its Findings from the 1985 Hearing in January, 1986. The panel noted that it had considered the 1982 findings, <u>but did not elaborate</u> and instead focused on the post 1982 conduct. In June, 1986 the Committee then provided the Applicant with another Hearing. The Court summarizes what happened next beautifully as follows:

> "Despite the Committee's professed concern in 1985 with . . . post-1982 conduct, the Committee's 1986 findings and conclusion painted a much different, and far more damning picture than did the findings of the hearing panel. Eleven of the Committee's thirteen findings of fact were restatements of the 1982 findings.
> . . .
> In fact, nowhere in the Committee's findings and conclusion is the date of any alleged misconduct mentioned. . . . The balance of the hearing was comprised of a question and answer session pertaining to . . . misconduct prior to 1977. . . . we are troubled by three considerations.
>
> **First, it is clear from the hearing transcript that both <Applicant> . . . and his attorney were caught woefully off-guard by the Committee's questioning. . . . The hearing panel's notice of hearing, the hearing itself, and the panel's findings consistently emphasized that the critical issue to be considered was . . . post-1982 conduct. . . .**
>
> Second, by questioning <Applicant> . . . on the facts underlying the 1982 findings, the Committee was, in essence, going behind its own findings. By so doing, the Committee placed <Applicant>. . . in an unfair dilemma. If, on the one hand, <Applicant> . . . challenged the 1982 findings, he left himself open to lack of candor charges, ... On the other hand, if <Applicant> . . . accepted the 1982 findings, he left himself open to charges that he had lacked candor in 1982 by refusal at that time to acknowledge culpability. . . .
> **. . .**
> . . . counsel aptly stated in his closing argument to the Committee, lack of candor is "a valid standard . . . but that's something different than saying that because there is a dispute as to testimony, that therefore is lying."
> . . .
> **The foregoing matters raise significant doubts about the fairness of the Committee's proceedings.** Certainly, the Committee appears to have allowed itself to be carried away by the distant tide of . . . . earlier misconduct."

Footnote 8 of the opinion states:

> "In its brief to the court, the State Bar repeatedly refers to <Applicant's>. . . involvement in the child custody incident as an "assault," although the Committee made no such finding, and no charges of assault were ever filed. . . ." [210]

The State Supreme Court did an exceptionally good job in this case.

782 P.2d 602 (1989)

WHEN LUCK RUNS OUT

The Applicant in this case had the following record:

A. Arrested in 1975 for possession of marijuana. Charges dismissed.
B. Arrested in 1978 with a suitcase containing cocaine. Charges dismissed.
C. Arrested in 1979 when he picked up a package containing marijuana. No charges filed.
D. Police found cocaine in Applicant's car in 1982 following a traffic stop. No charges filed.
E. Arrested in 1982, charged with knowingly and intentionally distributing cocaine. Applicant pled guilty and received a three year suspended sentence, with a six-month actual sentence and five years' probation. Applicant served 147 days at a federal work camp and probation terminated in 1988.
F. All but the first arrest occurred after the Applicant entered law school.
G. Applicant's most extensive drug dealing took place while he studied for the bar exam.
H. Before any of the arrests Applicant was a deputy sheriff and gave more than 80 drug information lectures to school children, warning them of the use of illegal drugs. [211]

He submitted to the Bar Committee 33 letters of recommendation including 6 from members of the California Bar that stated he had an excellent reputation for honesty. He also demonstrated some community involvement since his release from prison. The State Supreme Court rules in favor of the Bar, denies admission and allows the Applicant to reapply in two years. I agree with their opinion.

I also would not admit the Applicant, but would allow him to reapply, at which time I would focus on rehabilitation. He was convicted of a serious crime and that reflects adversely upon consideration of his application. An insufficient period of time has lapsed between conviction of the crime and the application. My determination is predicated on the fact that he was convicted, the short length of time lapsed since the conviction and minimal evidence of rehabilitation. I give little weight to the arrests that resulted in dismissals or no filed charges. Similarly, I give little weight to the letters of recommendation since they only indicate he has friends. The focus is on the conviction and the nature of the crime. It is the standard by which our society assesses a person's character.

791 P.2d 319 (1990)

BANKRUPTCY DISCHARGE AGAINST THE APPLICANT

The Applicant was never convicted of a crime. He was a member in good standing of the New York Bar and had never been the subject of a disciplinary proceeding. He performed work for the New York Legal Aid Society. He submitted letters of recommendation from seven judges, seven attorneys and a pastor. The Bar Committee denied certification for the following reasons. In 1980, he filed for bankruptcy to avoid paying a judgment related to a 1970 fatal car accident in which he was involved, and that money judgment was discharged in the bankruptcy. In 1980, he was also denied admission to the Florida Bar on character grounds. The Florida Bar determined the following instances of wrongful conduct that the Applicant did not dispute:

1. He testified falsely in a deposition during the wrongful death suit that he had no joint interest in any checking account, when in fact he had a joint account with his wife.
2. In his Florida Bar application, he misrepresented the amounts paid by him towards the judgment in the wrongful death suit
3. He refused to make further payments on the judgment
4. He reapplied to the Florida Bar in 1983 and 1987 and was denied admission on character grounds. (Ultimately, he was admitted to the Florida Bar in 1998)
5. He took no steps to fulfill his moral obligation regarding the wrongful death judgment

The California State Supreme Court rules in his favor. The opinion is predicated on the fact that the State Bar violates the Bankruptcy Act by denying certification on the ground that a person has a moral obligation to pay a money judgment. The Court notes that the government is prohibited under statutory law from denying a license to a person solely because he has not paid a debt discharged in Bankruptcy. The Court further notes that the significance of the Applicant's conduct was diminished by the passage of time. The automobile accident occurred twenty years before. The most interesting aspect of the opinion is the Dissent, which I do not agree with. The Dissent contests the Court's holding that federal law prohibits consideration of the bankruptcy. The Dissent irrationally states:

> "As the majority notes**, a governmental unit may not deny a license to a person "solely because" he "has not paid a debt** . . . was discharged under the Bankruptcy Act." (11 U.S.C. Par. 525(a)) . . . I disagree with the majority's conclusion that refusing to certify petitioner on the evidence presented would violate this principle . . .
> **. . .**
> . . . our decisions make clear that section 525(a) **does not foreclose consideration of the continuing indebtedness** as an indicator of lack of rehabilitation from prior defects in moral judgment."

Essentially, the Dissent's position is that although you can't deny a law license because an individual discharged a debt in bankruptcy, you can consider the failure to pay the debt. The position is predicated on an illogical parsing of words to render an absurd and irrational conclusion. Through manipulative use of logic, the Dissent seeks to "evade" the mandate of the Bankruptcy Act for the purpose of enhancing State Bar power. The Dissent's irrational opinion closes as follows:

> "Moreover, the majority's assumption that petitioner's misconduct is in fact not "related to the practice of law" is far from warranted. **It is undeniably true that drunk driving, or filing for discharge of a debt, is not necessarily related to the practice of law**. Petitioner's drunk driving and ensuing bankruptcy, however are not the misconduct alleged in this case. Rather, the true issue is petitioner's dishonesty and disrespect for the legal process." [212]

The Dissent's irrational opinion is important because its' "magical" use of logic ultimately became the warped reasoning adopted by many other states on this issue. As such, it has resulted in State Bars denying admission to many Applicants who declare bankruptcy. The State Bars do so in violation of federal authority. Their irrational notion suggesting that although you can't deny admission based on discharge of a debt in bankruptcy, but can deny admission based on failure to pay the debt, is blatantly ridiculous. To accept such a position requires a warped interpretation of the express language in the statute, that does not comport with its obvious intent. It demonstrates how the manipulative use of statutory construction by State Bars and Courts vacillates wildly from implied construction to strict construction, in order to serve their immediate self-interest. No uniformity or consistency.

Most importantly, the construction suggested by the Dissent lacks logical sense. If you deny admission based on failure to pay discharged debts, then you are substantively adopting a principle that Applicants will be penalized for declaring bankruptcy. **Of greater importance is the fact that the ethical rules of conduct for licensed attorney members of the Bar, contain no requirement that attorneys pay their debts.** How can the Courts then rationally deny admission to an Applicant based on failure to pay debts? The answer is that they can not do so rationally, but can only do it irrationally. My concern is that the Bar's asserted position which substantively "evades" Federal law by the use of manipulative logic makes them appear very deceptive and misleading. Not entirely candid, but instead trying to sneak their position through, even though the rule of law mandates otherwise. The assertion of such a logically flawed position by the Bar impacts on whether the Committee members possess the requisite moral character to practice law.

I would admit the Applicant without a doubt. The majority's opinion is for the most part correct and the Dissent is out in the woods with respect to its' ridiculous misconstruction of the impact of Section 525(a) and the Bankruptcy Act. Similarly, the Dissent's statement that "It is undeniably true that drunk driving . . . is not necessarily related to the practice of law" is incorrect. Drunk driving is a lot worse than not being able to pay your debts. The determinant factor is whether the Applicant was ever convicted of a serious crime, which would include a DWI. That is how we are supposed to determine guilt or innocence with respect to an alleged act. A conviction for any serious crime, including a DWI, is related to the practice of law. To the extent that a DWI does not necessarily impact on an individual's trustworthiness, such is only a mitigating factor.

815 P.2d 341 (1991)

The Applicant appears to have never been convicted of a crime based on facts sets forth in the court's opinion. Between 1980 and 1987 he took the bar exam 13 times before finally passing in 1987, which a Footnote in the opinion points out, "may be a record, but of course it is not fatal or even relevant to the decision."

He graduated cum laude from college and while an undergraduate was active in consumer affairs, and served as the first director of the university's Consumer Protection Project. He also co-authored a consumer rights handbook. He received several awards and citations for his work. He graduated from law school in 1980 and in 1985 joined a Southern California based consumer group known as CALJUSTICE, an organization seeking reform of the attorney disciplinary process, including its removal from the hands of the State Bar. The admission committee must have just loved that. He was a visible advocate for change in the attorney disciplinary system, appearing before several state legislative committees, the State Bar Board of Governors and other forums. He did this on an uncompensated, volunteer basis. Stated succinctly, the State Bar had motive to cause this Applicant trouble. He was seeking through appropriate legal means to weaken their organization. The State Bar also had the opportunity. The admissions process. The Bar focused on some of his personal litigation. It then denied admission on character grounds for the following purported reasons:

1. Litigation commenced by the Applicant demonstrating a pattern of harassment
2. Omitted from his bar application litigation in which he had participated
3. Showed a lack of respect for the law
4. Engaging in un-consented tape recording of telephone conversations

The primary focus of the Bar's inquiry was on incidents that occurred between the Applicant and his former classmates. He wasn't getting along with some former law school classmates and ultimately it impacted upon his application. The facts in the opinion do not clearly indicate who was at fault. Essentially, what you had were four students who at one time were friends and subsequently the friendships ended. Ultimately, there were mutual allegations of harassive telephone calls, the anonymous mailing of sexually explicit postcards and fragments of newspaper clippings. It is not clear whether the Applicant was the responsible party or whether he was the victim, as he asserted. Little evidence corroborated that he was the responsible party, other than allegations from ex-friends. He similarly alleged they were responsible. Mutual self-serving accusatory allegations that appear for the most part to balance each other out. Ultimately, he instituted suit against some of his ex-friends. He was represented by an attorney in all of the proceedings with the exception of one small claims matter. The opinion contains a somewhat amusing Footnote (8) with respect to the litigation engaged in by the Applicant that states:

> **"The hearing panel's conclusion that petitioner used the courts for "personal reasons" is also puzzling. The bulk of civil proceedings brought by individuals would qualify for reprimand under this rubric."**

The Bar alleged that in his application, the Applicant omitted several of the lawsuits, until the omissions were brought to his attention. His stance was that the omissions were inadvertent. The Bar countered that his explanation was unconvincing because he appeared to be otherwise meticulous with details. The Court decides squarely in his favor stating:

"We are not informed by its decision, however, what the panel made of these omissions--it made no finding that they constituted acts of moral turpitude. Presumably the panel inferred that petitioner's failure to disclose the lawsuits until asked by the State Bar to submit an updated long-form application was accompanied by an intention to conceal the fact of the litigation from the State Bar.

The evidence, however, undermines such an inference. It discloses correspondence in 1986 between petitioner, the State Bar, . . . in which petitioner noted the restraining order he had obtained against . . . and his subsequent defamation action . . . . The record includes a reply from the State Bar's executive director inviting petitioner to provide any additional information . . . Thus, in 1986 petitioner certainly knew that the State Bar was aware of the . . . litigation. . . . He would thus have had no discernible reason to fail to disclose the litigation in his application in the hope of concealing it from the State Bar.

We have distinguished between affirmative misstatements intended to place an applicant at an advantage and the unintentional nondisclosure of information which, under the circumstances, is not morally significant. . . . Given the circumstances of record, notably the absence of any apparent motive on the part of petitioner to lie about the matter, the failure to include the litigation appears to us to qualify as the sort of "unintentional nondisclosure of a relatively unimportant matter" which does not justify exclusion from the bar."

In reference to the Bar's allegation of un-consented tape recording of phone calls, the Court notes it was not necessarily unlawful. The Court criticizes the Bar instead for placing an unwarranted value on the fact the recording was made without consent, and ignoring the substantive evidential value of the cassette's contents. The Court states:

"Rather than assess the substantive evidential value of the content of the cassette recordings in assisting it in resolving the pivotal issue in the case, the hearing panel instead seized on the fact that the tape recordings were made without . . . knowledge as an additional basis on which to fault petitioner's character. It ruled that the making of the cassette revealed another character defect--a "lack of respect for the law"--and furnished an additional ground on which to deny petitioner admission.

Of all the evidentiary uses to which the tape recordings and their contents might have been put, the hearing panel's seems the most dubious. . . ."

The Court orders that he be certified for admission. It is an excellent opinion. The fact set suggests the Bar was acting out of vindictiveness. This guy was challenging their disciplinary process, had never been convicted of a crime, and the most the Bar could come up with to use against him was some minor litigation he was involved in. The manner in which the Court addressed the litigation issue is excellent and deserves repeating because it is equally applicable to issues other than litigation:

" He would thus have had no discernible reason to fail to disclose the litigation in his application in the hope of concealing it from the State Bar.

We have distinguished between affirmative misstatements intended to place an applicant at an advantage and the unintentional nondisclosure of information which, under the circumstances, is not morally significant. . . . notably the absence of any apparent motive on the part of petitioner to lie about the matter, the failure to include the litigation appears to us to qualify as the sort of "unintentional nondisclosure of a relatively unimportant matter" which does not justify exclusion from the bar." [213]

The Court is hitting on the key elements of what constitutes a lack of candor. Those elements are as follows:

a. An affirmative misstatement, rather than simply a nondisclosure
b. Material in nature
c. Made with intent to deceive

Simply failing to disclose immaterial matters is not "lying." But what determines whether something is "material" or "immaterial?" The Court states it perfectly above:

"***notably the absence of any apparent motive on the part of petitioner to lie about the matter"***

What determines whether "motive" exists? Obviously, whether affirmative disclosure would have a negative impact on the ultimate decision. The resulting simple rule for assessing truthfulness should be as follows:

A nondisclosure of information is immaterial for purposes of assessing the Bar applicant's truthfulness and candor, if affirmative disclosure of such information would not result in denial of admission to the Bar.

A related corollary is as follows:

The affirmative misstatement of material information with an intent to deceive is a valid basis for denying a Bar applicant admission on the ground they lack the requisite moral character and fitness.

In conclusion, it is grossly unfair to treat a nondisclosure with the same harshness as an affirmative misstatement. To do so, places the Applicant at the whim and mercy of his future competitors and the Bar, which can arbitrarily and discriminatively determine the degree of disclosure necessary to probe all facets of an individual's past, background and beliefs.

CONNECTICUT

294 A.2d 569 (1972)

WE ARE PLEASED TO INFORM YOU THAT THE LAW SCHOOL YOU GRADUATED FROM WAS ACCREDITED IN 1954. UNFORTUNATELY, SINCE YOU GRADUATED IN 1952, WE NOW DISBAR YOU. WE MADE A MISTAKE ADMITTING YOU.

Connecticut had a system, that appears custom built for conflict. Admission was granted by an individual Superior Court judge, based on the recommendation of local county bar committees. The Applicant was a member of the NewYork bar. He graduated from New York Law School in 1952. In 1969, he applied to the Connecticut Bar Examining Committee for a certificate of educational qualifications that was required for admission to the Connecticut Bar. He then applied to the Superior Court for admission and informed the clerk's office he had applied for the educational certificate, but had not yet received it. The clerk attached a note indicating the certificate was lacking. Notwithstanding the absence of the certificate, the County Standing Committee recommended his admission and the court then admitted him. The County Committee just assumed New York Law School was accredited when he graduated. The County Committee "failed to disclose" to the Court that the educational certificate had not been issued yet.

In 1970, the Bar denied his application for the educational certificate on the ground New York Law School was not accredited when he graduated. The school had however become accredited two years after his graduation in 1954. The County Committee asserted the school should be considered properly accredited with respect to the Applicant. They presented these facts to the judge who had admitted the Applicant and the court held a hearing. At the Hearing, the Committee Chairman disclosed all that had happened and asserted the Committee considered his law school as properly accredited. The judge then correctly endorsed the report. Upon learning of the court's decision, the State Bar Examining Committee brought an action to vacate the Order admitting the Applicant. The Applicant appealed on the ground the court lacked the power to vacate the judgment of admission. He claimed that having admitted him the Court could not remove him. The Connecticut Supreme Court ruled in favor of the State Bar in an irrational opinion that states:

> "Because of the peculiar facts surrounding the granting of the temporary license and the total disclosure of facts by the respondent, it is evident that all parties did not want to cast any implication of disgrace on the respondent. Although the proceedings were not given any label, they were in fact proceedings to disbar. Unfortunately, the word "disbar" connotes misconduct.
> . . .
> **The issue then is whether the Superior Court may remove the respondent from practice after the time for reopening the judgment admitting him has passed.** Practice Book 19 provides the answer : "The Superior Court may, for just cause, suspend or disbar attorneys."
> . . .
> The court is not restricted in this function to removal solely for misconduct. Any unfitness--whether moral, mental, educational or otherwise will constitute just cause for denying one the power to act as an attorney.
>
> While the Superior Court has established disbarment procedures only in the case of misconduct, the court, in the absence of specific provisions, has the power to conduct proceedings as it sees fit. . . .

> . . .Confronted with the fact that the respondent had not satisfied the educational requirements of Practice Book 13, the court had no choice but to remove the respondent from practice as an attorney."

This case can be summarized as follows. The local Standing Committee screwed up by recommending admission without first receiving the educational certificate. It also failed to disclose the absence to the Court. The admitting Superior Court screwed up by not carefully scrutinizing the record to see if the educational certificate was present. The State Bar then "evaded" the rule of procedure placing a time limit on reopening judgments by asserting the Superior Court's Order of admission was not a judgment. Simultaneously, they asserted that New York Law School's accreditation in 1954 was invalid for a 1952 graduate submitting a bar application in 1970.

The end result is that an Applicant who did absolutely nothing wrong is not only denied admission, but worse yet is unjustly branded with the stigma of disbarment which he must report on an application to any other Bar. This all occurs because of the County Standing Committee's screw-ups, the State Bar's intent desire to perpetrate an obvious injustice and the State Supreme Court's irrational willingness to penalize an innocent Applicant for the colossal foul-ups of the Committee and Bar. It is particularly interesting that while the State Supreme Court construed procedural rules in an extraordinarily strict fashion against the Applicant, it simultaneously had the colossal gall to make the statement:

> "While the Superior Court has established disbarment procedures only in the case of misconduct, the court, **in the absence of specific provisions**, has the power to conduct proceedings **as it sees fit**." [214]

392 A.2d 452 (1978)

WE'RE COMMITTEE LAWYERS. WE DIDN'T THINK CONSTITUTIONAL NOTIONS OF FAIR PLAY APPLIED TO US. WE REALLY THOUGHT WE WERE EXEMPT.

In this case, two Applicants both members of the New York Bar were denied admission on the ground they had not satisfied the local standing committee that they would devote a major portion of their working time to practicing law in Connecticut and also on moral character grounds. The Applicants appealed to the Connecticut State Supreme Court. One minor problem though. The Supreme Court had neither a transcript of the proceedings, nor a record sufficient in detail to show the facts developed by the committee with respect to the moral character issue.

There was also nothing to show that the Applicants had been given an opportunity to explain or refute facts adverse to them. Kind of like a little Star Chamber. They reject the Applicant on moral character grounds, but don't give the State Supreme Court the reasons for rejection. They just arbitrarily decide to deny admission. The Connecticut Supreme Court's opinion states:

> **"In lieu of a transcript of the proceedings and what was said by the applicants as to their intention to practice in Connecticut, the court had for consideration only the recollections of the two applicants and the recollections of two members of the committee, supplemented by the personal notes of the chairman. . . .**
>
> The conclusion of the standing committee that the applicants had failed to satisfy the committee that they were of good moral character appears to have been predicated upon information obtained by the committee subsequent to the filing of its first report. . . .
>
> **The circumstances giving rise to this appeal make abundantly clear the reasons why this court spelled out . . . the necessity for a transcript or other adequate record of the proceedings of a standing committee . . .**
>
> **In no way do we impugn the industry and integrity** of the members of the Fairfield County standing committee who, in responding to the call of the court, perform a difficult and time-consuming task of great assistance to both the bench and the bar . . . ." [215]

In no way do we impugn the industry and integrity? Sorry, that's exactly what the Court was doing. And for good cause. No record makes for a smelly case.

601 A.2d 1021 (1992)

EVERYBODY'S GOT SOMETHING TO SAY.

WE'RE WILLING TO CORRECT THE DEPRIVATION OF DUE PROCESS, NOW THAT YOU'VE RAISED THE ISSUE IN COURT. TOO BAD THE CHARACTER WITNESS YOU WANTED TO TESTIFY FOR YOU, ISN'T HERE ANY MORE.

This case illustrates the complex lunacy of the Connecticut system which is custom built for conflict, because too many committees, agencies and courts are involved. Typically in most states, the State Bar assesses character and makes a decision. Adverse decisions are then appealable to the State Supreme Court. Connecticut apparently wants everyone to have their little say, and different standards are applied by each group.

The Applicant was unanimously recommended by the Fairfield County Standing Committee for admission. Thereafter, the State Bar Examining Committee conducted its own investigation and rejected him on character grounds. He sought review in the trial court claiming the State Bar Examining Committee (BEC) acted arbitrarily and in abuse of its discretion. The trial court ruled in his favor. The BEC appealed and the Appellate Court transfers the appeal to the State Supreme Court. Got all that? Substantively, the issues were as follows. The Applicant used marijuana from 1977 - 1985 resulting in three convictions for possession. He revealed them on his application.

After the Fairfield County Standing Committee recommended admission, the BEC notified the Applicant that on February 19, 1988 it would hold a hearing. The BEC Notice advised the Applicant he could bring an attorney, and documents or witnesses relevant to the area of inquiry which was his criminal record. The Notice also indicated however, that general character witnesses would not be permitted. The Applicant appeared without counsel and responded to extensive questioning. The committee denied admission and each member placed the reason for his vote on the record. The reasons delineated by two of the three members were stated in vague, ambiguous and general terms as follows:

1. Applicant's "explanation . . . was not credible."
2. "applicant displayed a lack of candor and did not appreciate the importance of his testimony."

The third member voted to deny based on the three convictions. The trial court nevertheless, ordered admission. The BEC appealed on the ground that the trial court lacked authority to assess moral character. The State Supreme Court is obviously dealing with a power struggle. Who has the final word short of the State Supreme Court on character assessment, the BEC or the trial court ? In the midst of this power struggle, is the helpless Applicant who just wants to be admitted, but has basically become a Pawn in their power game.

The Applicant claims the BEC deprived him of due process rights of notice and an adequate opportunity to rebut adverse evidence. The State Supreme Court rules that the Superior Court may review the BEC's negative recommendation, but such a review is not an independent examination (de novo). Rather, the trial court is limited to determining whether the BEC conducted a fair and impartial investigation. In making this determination one issue that must be decided is whether the BEC must give weight to the Fairfield County Standing Committee's recommendation. It is now obviously a mess. The local committee, the BEC, the trial court and then the State Supreme Court.

The Supreme Court determines that while the trial court may not conduct a de novo hearing, the BEC may do so and does not have to give any consideration to the standing committee's findings. This is obviously ridiculous, since it is clear there is a great deal of friction between the local standing

committee and the BEC. Such friction creates a high probability of creating a situation where receiving the local standing committee's positive recommendation, actually functions as a detriment. The State Supreme Court however, is going BEC right down the line. In reference to the general, conclusory nature of the BEC's purported "Findings" the State Supreme Court cops out and states:

> **"In this case, although the executive committee members did not articulate the precise facts underlying their ultimate conclusions, their failure to do so is not reversible error.** The committee should ordinarily find only the ultimate facts. . . ."

By adopting such a posture, the requirement of having facts and findings is negated. The BEC is essentially given the power in substance, if not form, to deny admission for any ambiguous reason. In reference to the Applicant's assertion that the BEC violated his right to procedural due process by questioning him on February 19, 1988 about matters of which he had no notice, and prohibiting him from presenting general character witnesses, the State Supreme Court cops out again stating:

> "Although not represented by counsel, the petitioner, a law school graduate, did not object to the notice he had been given nor to the fact that he was prohibited from presenting general character witness 10 at the time of the first hearing. Moreover, on November 17, 1989 the BEC conducted a second hearing . . . . At that time, the chairman of the executive committee informed the petitioner's counsel that he was "free to present anything that he considers relevant. . . ."

Footnote 5 of the Court's opinion indicates that the November 17, 1989 hearing was scheduled just prior to the hearing on the petition filed in the Superior Court. The Applicant agreed to postpone the Superior Court hearing pending another BEC hearing. I believe this suggests the BEC convinced the Applicant to postpone the Superior Court hearing for the purpose of curing its' own defects in procedural due process. The concept being:

> "the applicant has us on due process grounds, so let's just have another hearing for the purpose of weakening his case."

Apparently, the BEC was successful because the Supreme Court's opinion states:

> "We are persuaded that the BEC corrected any possible due process violations as to notice and to the prohibition on general character witnesses by giving the petitioner an opportunity to present evidence involving his "criminal record or . . . any other matter . . . ."

A few additional footnotes in the opinion are noteworthy, tending to raise an eyebrow or two. Footnote 3 states in reference to the BEC:

> "Although five members of the executive committee participated in the factfinding hearing, the minutes reflect that only three voted on the petitioner's application at the subsequent executive session."

Footnote 7 states:

> "The constitutionality of denying admission to the bar solely on the basis of any past criminal act was placed into doubt by the United States Supreme Court's opinion in Schware v. Board of Bar Examiners, 353 U.S. 232, 243, 246-47 (1957). In that case, the court stated that the nature of an offense must be taken into account in determining whether the commission of an offense is rationally connected to a person's moral character . . . ."

Footnote 10 explains the entire case, because it demonstrates the politics involved. It states:

> ". . . the BEC apparently had before it letters that had been submitted to the standing committee by a Superior Court judge, **the petitioner's brother, who is an attorney**, and an assistant clerk at the Milford Superior Court, all attesting favorably to the petitioner's character."

The Applicant's brother was an attorney. A critically important fact buried in a footnote. It is my guess there was friction between the brother and the BEC, and the brother was influential with the local standing committee and Superior Court. It all comes down to who you know, or in this case, who it probably wasn't advantageous to know. Lastly, Footnote 12 states as follows:

> **"In this respect, fitness to practice law may be analogized to parental fitness."** [216]

The analogy raises too many disturbing issues associated with governmental paternalism for analysis herein.

Superior Court of Connecticut, No. 032-05-50, Feb. 18, 1994

YOU'RE ADMITTED. NO!! WAIT, YOU'RE NOT ADMITTED.
WELL, ACTUALLY WE MEAN YOU SHOULDN'T HAVE BEEN ADMITTED.
ANYWAY IT WASN'T OUR FAULT. IT'S THIS STUPID SYSTEM WE HAVE.

The Applicant was a member of the Pennsylvania Bar. His application in Connecticut was initially referred to the New Haven County Standing Committee. This however, was apparently a clerical error. As a result, it was referred back to the BEC with a favorable recommendation from the Standing Committee. The BEC then conducted an independent investigation. By letter dated August 12, 1989 the BEC notified the Applicant that it would hold a hearing on September 15, 1989 to consider the following items:

1. failure to respond to inquiries
2. credit questions
3. law school incident
4. negative comments

At some point however, the Applicant was somehow admitted to the Bar, because on June 8, 1990 the BEC moved to revoke the Admission on the ground it was improvidently granted. This is obviously a case where due to the unique procedure for admissions in Connecticut, the left hand constantly does not know what the right hand is doing. The end result is that the Bar consistently ends up looking foolish. The Court determines that the Applicant was denied procedural due process because the Committee gave no reasons for its conclusion that he lacked good moral character. It then remands the case back to the BEC. The following portion of the opinion is nothing less than pathetically sad or funny depending on how you look at it. If it weren't for the unjust impact upon the Applicant, I would opt for funny, but the impact of the BEC's stupidity on the Applicant precludes such a stance. The Court states:

> "the Committee was concerned about . . . **a law school incident involving an argument over a cup of coffee . . . .**
>
> Applying the Committee's own definition of good moral CHARACTER, **it is the holding of the court that the law school incident concerning the cup of coffee is insufficient standing alone to support a conclusion of the absence of good moral CHARACTER**. It is further the holding of the court that the letter from . . . not only is insufficient standing alone . . . but appears in the transcript never to have been directly discussed with Mr. . . . . The treatment of this letter appears to be the most glaring example of a lack of due process at the administrative hearing. . . .
>
> . . . The Committee should not find <Applicant> . . . to lack good moral CHARACTER based solely on **the law school incident concerning the argument over the cup of coffee** nor should it find him unqualified based solely on the comments of . . . **nor should it find him unfit based solely on any combination of the cup of coffee incident and the . . . letter."** [217]

The BEC's denial of admission on moral character grounds is so pathetically stupid, I refrain from making further comments on this case. The only thing "improvidently granted" in this case, was giving such State Bar nitwits the authority to assess moral character.

DISTRICT OF COLUMBIA

333 A.2d 401 (1975)

OBJECTIVE TESTS ARE ALWAYS BETTER

The Applicant was denied admission on character grounds. He contended that the standard of good moral character was unconstitutionally vague and the Committee's findings were wrong. He was essentially attacking the Bar admissions process at one of its' weakest point. The Court's opinion is therefore understandably short for strategic reasons. The Court states:

> "It is true that the term "good moral character" is a term of **broad dimensions** and, as has often been said, can be **defined in many ways**. . . No doubt satisfaction of the requirement of moral character involves an **exercise of delicate judgment** . . . that it expresses "an intuition of experience which **outruns analysis and sums up many unnamed and tangled impressions**,- impressions which may **lie beneath consciousness** without losing their worth."

The Court's opinion concludes by holding as follows:

> "So, it would appear that appellant must meet the historic standard of "good moral character"- **there being no better test** for the purpose known to us; and the Committee on Admissions, and upon occasion this court, **must apply the standard judiciously**." [218]

It is ironic the Court would render an opinion recognizing the primary reasons why the character standards are unconstitutionally vague, and then remarkably arrive at the irrational conclusion that they are constitutional. I disagree with the Court's determination that there are "no better tests." Objective tests are always better than those which are subjective and "lie beneath consciousness" being of "broad dimensions." The test I propose is simple and objective. **An individual who has never been convicted of a crime triable by jury (contempt is typically not triable by jury and would therefore be excluded), or subject to professional discipline meets the moral character standard. Period**. An individual who has been convicted of a crime or disbarred has their moral character assessed in light of the conviction or disbarment with appropriate emphasis on rehabilitation. Simple, objective, fair and uniform to everyone applying without the need to apply "unnamed and tangled impressions." **Even assuming other matters are sufficiently important to justify inquiry, the standards of justice mandate that such inquiries be made periodically of all judges and attorneys.** Not just Nonattorney Bar Applicants.

494 A.2d 1289 (1985)
538 A.2d 1128 (1988)

This is one of the few cases where the Court grants admission and I am not so certain that I agree. It involves three Applicants. What is remarkable is that the Applicants were granted admission in this case, while countless others are irrationally denied admission for only trivial matters.

The first Applicant in this case was convicted of voluntary manslaughter. The facts were undisputed. In 1970 he pled guilty to driving with a suspended license and served 3 days in jail. In 1971 he was convicted of disorderly conduct and driving while intoxicated. In 1972 he was convicted for possession of controlled substances and sentenced to 60 days. Near the end of 1972, he agreed to assist a friend in getting back drugs they believed were stolen by another student. They threatened the student with a knife and pistol-whipped him. Two acquaintances of the student showed up unexpectedly and the Applicant used chloroform on them, which killed one. The Applicant evaded arrest for 4 months. He was indicted for first and second degree murder and felony murder, but entered into a plea bargain for voluntary manslaughter. In 1973, he was sentenced to 15 years in prison.

While in prison, he became a jailhouse lawyer, completed his bachelor of science degree and tutored other inmates. He participated in group therapy and ultimately became a co-therapist. He was paroled in 1976 and entered a paralegal training program. In 1977 he served an internship with a program formed to combat racial bias. After his parole ended in 1979, he enrolled at Antioch School of Law in Washington, D.C. where he served as editor of the Prison Law Monitor. He also worked as a part-time law clerk with a local law firm. He completed his law school studies one semester early. There were no incidents of subsequent criminal behavior.

He passed the 1982 D.C. Bar exam and then attended several hearings on his moral character. He presented testimony from over 20 persons including lawyers, paralegals, and law professors. All were aware of his prior convictions. The judge who sentenced him for manslaughter wrote the Committee a favorable letter stating:

> "I was of the opinion then and now that he did not intend to cause death. . . . As far as I am concerned, he has paid his legal debt to society for his unlawful conduct . . . . If you find him to be sincere and trustworthy, I certainly would not criticize you if you were to grant him admission to the bar."

The six members of the Committee were divided evenly and each group submitted a report. The District of Columbia Court of Appeals first decides in 1985 to remand the case back to the Committee for further proceedings. A strong Dissent is written by three Judges indicating that remand is inappropriate because the Applicant is unfit for admission based on his convictions. After further proceedings, the Bar Committee recommends admission with one Dissent. The case is then consolidated with two other Applicants, also convicted of serious felonies, and another opinion is rendered by the District of Columbia Court of Appeals in *538 A.2d 1128 (1988).* All three Applicants are granted admission. The Court notes that the first Applicant had already been admitted to the Michigan Bar, the state in which he committed the homicide.

A few facts about the other two Applicants. One attempted to rob a bank at gunpoint in 1970. He fired several inaccurate shots at an armed bank guard, who returned the fire. The Applicant was seriously wounded. He entered a guilty plea to a charge of attempted armed robbery and was sentenced to twenty years imprisonment. He served seven and was paroled in 1977. After his parole, he attended Antioch law school and helped start a law journal. He had excellent references and for over a year worked as a clerk at a large law firm. He was not a member of any Bar when the Court rendered its opinion.

The third Applicant was arrested ten times between 1959 and 1966 for offenses related to his addiction to heroin. In 1962 he received a felony conviction for sale of narcotics. He served more than two years before parole in 1965. One year later he was convicted of narcotics distribution. This conviction was later vacated and the indictment dismissed on the ground of entrapment. He served five years in prison before the conviction was reversed. While in prison he acquired his high school equivalency diploma and completed several college courses. After his release, he finished his college education, obtained a masters degree from John Jay College of Criminal Justice and a law degree from Rutgers University. He also performed numerous social service activities and had numerous recommendations from reputable individuals. In 1985, he was admitted to the New York and New Jersey bars. Ruling in favor of all three Applicants, the Court states as follows:

> ". . . all the other jurisdictions of which we are aware have eschewed a per se rule of exclusion for previously convicted felons, opting instead for case-by-case determinations . . .

Regarding the first Applicant convicted of manslaughter the Court states:

> "It is now more than ten years since <Applicant>. . . was released from prison. We are persuaded that his rehabilitation is genuine and complete. . . . The sincerity of his remorse has impressed not only his friends and business associates but the Committee investigator . . . . He is attempting to atone for his act by dedicating his life to improving the lot of prisoners. . . . The quality of his good works touches every aspect of his life, and includes neighborhood teenagers as well as acquaintances and friends."

Regarding the second Applicant convicted of attempted armed robbery the Court states:

> "We also accept the Committee's recommendation and admit <Applicant>. . . . The Committee found that . . . single criminal episode, the attempted armed robbery of a bank, occurred when . . . emotionally immature. . . ."

An interesting facet of the Court's opinion concerns the fact that it adopts a different standard for admissions compared to disbarment. The Court had held in *424 A.2d 94* (D.C. 1980) that an individual convicted of an offense involving moral turpitude must be permanently disbarred and never reinstated unless pardoned. The Court now addresses whether that holding precludes an initial admission. It states as follows:

> "We are satisfied that this court can adopt a rule for the admission of applicants who have committed felonies that differs from the rule it employs in connection with the application for readmission of a former attorney who was disbarred for committing a felony. . . .
> . . .
> . . . Apparently, only one state, New York, has a mandatory, permanent disbarment provision similar to that of the District of Columbia. Under New York law, any attorney convicted of a felony, "shall upon conviction, cease to be an attorney." . . . The court in New York have the power to vacate or modify an order of disbarment only upon the reversal of a conviction or a pardon. . . .
>
> We know, however, that New York has admitted some persons previously convicted of felonies to its bar. . . .

Thus, the only jurisdiction other than the District of Columbia that disbars and precludes the readmission to the bar of all felons has adopted a more lenient rule for those previously convicted of felonies who apply for the first time for admission to the bar. . . ."

Two Judges filed a Concurring Opinion approving of the ultimate decision, but have difficulty with the foregoing contradiction. They state:

"I have difficulty with the idea that a lawyer has a higher obligation than a lay person not to violate the law. But, even if there is merit to that idea, I do not believe it should serve, in any way, to justify admission . . . . if convicted of the same crime after admission, would have to be disbarred permanently. **I believe the same policy, whether eligibility to apply (or reapply) . . . should apply in both situations."**

Two Judges file Dissenting opinions. They would deny admission on the basis of the convictions. One of the Dissents notes that the serious nature of the crimes raises a presumption of bad moral character that would need to be overcome by clear and convincing evidence (not merely a preponderance of the evidence). An interesting footnote reads as follows:

"I note with dismay the seeming indifference of most of the organized bar to these cases. Before oral argument, the court entered an order inviting "any sections or committees of the District of Columbia Bar," as well as six voluntary bar associations, to file amicus curiae briefs. None of the voluntary bar associations responded, and only two of the twenty sections of the unified Bar filed a brief; the other eighteen remained lamentably silent." [219]

My decision? I would probably with some hesitation, grant admission to the third Applicant convicted of narcotics distribution based on the facts set forth in the opinion which appear to indicate rehabilitation. I would disregard the arrests not resulting in convictions.

The other two Applicants, one convicted of voluntary manslaughter and one convicted of armed robbery, I would with some hesitation deny admission. They are no doubt difficult cases. The crimes however, are too violent and serious in nature and there is no doubt the Applicants committed them. Convictions resulted. I really could not foresee granting admission to anyone convicted of such violent offenses, with one exception. I would be amenable for purposes of assessing a Bar application to consider whether the Applicant was really guilty of the crime they were convicted of. It would take powerful substantial corroborating evidence. In these two cases, the Applicants pled guilty. Assuming hypothetically, that they had pled innocent and continued to assert their innocence during the admissions process, I would review the appropriate factual matters to make an independent examination.

In summary, my position is as follows. Conviction of a crime does not automatically preclude admission. The application however must be considered in light of the conviction. For this purpose, the Committee should assess the nature of the crime, rehabilitation and also whether the Committee independently believes the Applicant really committed the crime. If you've never been convicted of a crime, there should be a presumption that you have moral character sufficient for admission.

Most of the other questions on the Bar application which are unrelated to the commission of crimes are designed solely to enhance the economic interests of the attorneys. And that is the reason why similar inquiries are not made periodically of licensed attorneys.

564 A.2d 1147 (1989)
579 A.2d 668 (1990)

These two cases deal with the trials and tribulations of one Applicant. They are a remarkable contrast to the prior set of cases dealing with convicted felons.

The Applicant in this case apparently wasn't particularly fond of Judges. In 1985, after being found guilty of assault, he was then found guilty of contempt for expressing his displeasure with the verdict. The assault conviction was subsequently reversed, leaving only the contempt conviction. At some point, he was investigated by the Texas Bar for engaging in the unauthorized practice of law, but no charges were filed. He sat for the 1982 and 1983 Bar exam, but did not pass. He then petitioned for re-grading and passed. You may recall from the Arizona case, how much the Bars like it when an Applicant petitions for re-grading. (See Ronwin Case in Arizona Section herein) There seems to be a direct correlation between an Applicant's respectful exercise of legal means for redress and a finding by the Bar Examiners of lack of moral character.

The Applicant's father was a member of the New Mexico Bar and DC Bar. The Applicant worked as a law clerk in his office and participated in the deposition of a witness. His participation resulted in a hearing before a New Mexico Judge. He purportedly represented to the Judge that he had passed the DC Bar, when in actuality he was still awaiting formal action on his petition for regrading. He also represented that he had graduated from Antioch Law School, when in actuality he attended Antioch for two years, before transferring to Potomac School of Law. The Judge held him in contempt for participating in the deposition, but permitted him to purge the contempt by paying the expenses of the other party.

In sum, you have an Applicant with one minor contempt conviction in Texas and that's it. The New Mexico contempt conviction had been purged and the assault conviction was reversed. No heinous offenses or serious criminal convictions of any nature. He does however, have an "attitude" that the Bar doesn't like.

After admitting convicted felons in the prior case, the DC Bar Committee denies admission in this case on character grounds. The Applicant appeals and what happens next is incredible. The Court first renders an opinion ordering admission. Judge Belson Dissents however. Judge Belson is the same Judge that wrote the majority opinion one year previously in the case admitting the convicted felons. Now, he doesn't feel an individual with a minor, contempt conviction should be admitted. That is pure hypocrisy. He writes as follows to justify the irrational assertion that an individual convicted of contempt should be denied admission, while one year before he wrote the lead opinion admitting three felons convicted of serious crimes:

> "In its discussion, the Committee indicated that it remained of the opinion that the entry of the Texas judgment of contempt . . . is evidence of the applicant's lack of respect for the judiciary and reflects poorly upon his competence to comport himself in the manner expected of a member of the District of Columbia Bar. . . The Committee also expressed its grave concern about statements in his brief which, in the Committee's view, indicated his lack of respect for the judiciary. The Committee was referring to the following passage in . . . support of his application for admission :
>
> > "Furthermore, the Applicant is in agreement with the Committee's statement that "his actions shows (sic) his lack of respect for the Rockwall County judiciary.
> >
> > **The Applicant cannot respect a judiciary system set on political favors, a system in which the judge has no legal qualifications, of one that uses the law for their own personal gain, and on (sic) which attempts to intimidate and humiliate those who**

are willing to speak the truth.

. . .

The Applicant further states that he cannot have respect for any institution that is undeserving of its respect. The Applicant states that for this he does not need to apologize (sic).”

Frankly speaking, I love what he wrote. Nevertheless, he is penalized for being a passionate individual with strong opinions that tends to tick off pompous, hypersensitive members of the Judiciary. There was absolutely no valid ground to deny his admission. The fact that the Committee would do so after recommending admission in the convicted felon cases demonstrates that admission decisions are based on who is willing to be subservient to State Bar economic interests, as opposed to who the Bar irrationally concludes has a bad “attitude.”

The admission decision is not predicated on one’s “acts,” but rather upon their willingness to be submissive to the Bar’s anticompetitive interests. After the Court's first opinion ruling in the Applicant’s favor, the case is heard again “en banc.” This time the Court rules in favor of the Bar Committee and admission is denied. It is clear there are a lot of political games going on by both sets of Judges. Judge Belson, previously the Dissent, now writes the majority opinion. Judge Terry who Dissented in the convicted felon cases, was in the majority in the Court's first opinion in this case. Now he writes a beautiful Dissent that sums the case up quite well, along with my position:

> “I cannot, in good conscience, join my colleagues in refusing to admit <Applicant>. . . to our bar. My views are essentially the same as those expressed in the Per Curiam opinion for the division . . . . Unlike the majority today, **I believe the only matter that we may properly consider on the issue of “good moral character” is the contempt conviction in Texas,** . . . . Though it cannot be ignored entirely, **I think the contempt conviction is too unimportant to stand in the way of his admission--especially when this court (over two dissents, including mine) saw fit to admit three convicted felons--a murderer, a bank robber, and a drug pusher . . . .** What the court is doing today is plainly at odds . . . . **If we admitted the three petitioners in that case to our bar, I cannot understand why we deny admission to <Applicant> . . ., whose major flaw seems to be that he has difficulty controlling his temper.**
>
> **In particular, I think the majority goes too far in attaching any weight at all to the alleged unauthorized practice** . . . I say this because the . . . authorities . . . have never seen fit to bring charges . . . as a result of that incident . . . . Such overreaching by the Committee should not be countenanced by this court.
>
> After all is said and done, I am left with the firm conviction that an injustice has been done . . . . It would be inaccurate to describe him as a diamond in the rough; he is a good deal more rough than diamond like. . . . tends at times to speak without reflecting on the impact of what he says. He is not a particularly good writer. As another member of the court remarked at oral argument before the division, he is “his own worst enemy.” But none of these traits should preclude his admission to the bar. . . . Nevertheless, I cannot help feeling that if <Applicant>. . . were a bit more polished or had gone before the Committee with a bit more deference (or a lot more), he would not still be fighting for admission to the bar seven years after passing the bar examination.” [220]

Judge Terry's Dissent for the most part sums the situation up extremely well. His position is wholly consistent. He Dissented in the cases that admitted the convicted felons, but would admit this individual with one contempt conviction. As indicated in the foregoing case dealing with the convicted felons, I probably would have admitted at least one of them. But how can you possibly admit three felons convicted of serious and violent offenses, and then deny admission in this case? That is irrational, arbitrary, capricious and conclusively demonstrates that whether the ability to practice law is classified in form as a "Right" or "Privilege," it is in substance treated like a "Privilege" to be granted only upon the grace and favor of the licensing organization.

By denying admission in this case, Judge Belson and the majority divested the convicted felon cases of what could otherwise have been their legitimacy. This saddens me, because as I indicated, I truly believe at least one of them should have been granted admission. I am also very open to considering the circumstances of particular convictions that don't deal with heinous, violent crimes, or the circumstances surrounding the legitimacy of a conviction. By flip-flopping in the above case however, the majority totally invalidated the legitimacy of the admissions process.

579 A.2d 676 (1990)

The Applicant graduated from law school in 1975. After eleven unsuccessful attempts to pass the California bar exam, he took and passed the 1980 Georgia bar exam and was admitted to the Georgia Bar. He went on to fail the California exam five more times. In 1981, he was admitted to the Tax Court Bar and the Bar of the United State's Court of Military Appeals. He was admitted to the Utah Bar in 1987. In 1985, he filed an application for admission to the DC bar. He was attempting to obtain reciprocity admission, pursuant to rules that allowed such without sitting for the bar exam. The issue was whether the DC reciprocity rule required him to demonstrate that he had actively engaged in the practice of law for five years.

The NCBE (National Conference of Bar Examiners) report indicated difficulty in obtaining references that could verify his law practice in Georgia. The DC Committee asked him to attend an informal hearing in 1986. It asked him to provide documentation relating to his Georgia practice, for the five years preceding his application, along with the names of clients or attorneys who could furnish information regarding his practice in Georgia. They also requested copies of his income tax returns. The Applicant requested a formal Hearing and one was held on June 2, 1987. At the Hearing, the Committee asked for the names of his Georgia clients. He responded that there were three. His girlfriend, and two Atlanta attorneys whom he had served in an "of counsel" role regarding tax issues. He was then asked why he disclosed on his application only his first unsuccessful attempt to pass the California Bar exam, when in fact he had taken and failed the exam sixteen times. He explained that as he understood the question on the DC application it required him only to list each state in which he had applied for the bar, and not each time within each state. Applying an objective standard his interpretation was reasonable. The question read as follows:

> "**List every state** to which you have ever submitted an application to be admitted by exam, motion or diploma privilege (or reinstated) to the bar, even if you subsequently withdrew the application. For each application indicate the date it was submitted **or the first exam taken** and its ultimate disposition (admitted to the bar, withdrew application, or not admitted). Explain any withdrawals or applications or failures to be admitted **(other than those due to failing the examination)."**

The phrase "other than those due to failing the examination" would seem to objectively clear the Applicant on this issue. Following the Hearing, he sent a letter to the Committee refusing to provide copies of his income tax returns. He also asserted that by requesting his tax returns the Committee was questioning his veracity under oath, which he felt was a direct challenge to his "religious convictions."

The Committee denied certification. It relied on two grounds in its' Report of Findings and Conclusions on Moral Character. The first was that he had not been actively engaged in the practice of law for five years. The second was that his evasiveness and lack of candor in responding to inquiries demonstrated a lack of good moral character.

The standard of review adopted by the Court was that it would give some measure of deference to the Committee's factual findings, and accept those findings, unless they were unsupported by substantial evidence. Regarding the Committee's interpretation of Court Rules however, the Court held there was no obligation to defer to the Committee. The reciprocity Rule at issue stated:

> "Any person may, upon proof of good moral character . . . be admitted to the Bar of this court without examination, provided that such person:

> (i) Has been an active member in good standing of a Bar . . . for a period of five years immediately preceding the filing of the application"

The Rule makes no mention of a requirement that the Applicant was engaged in the practice of law. The Court writes:

> "Thus, in plain and simple terms, all that this provision required . . . was active membership in good standing of the State Bar of Georgia. As the record shows, at the time of his application <Applicant>. . . met this requirement.
>
> . . .
>
> **Despite the clarity of the Rule and its history, the Committee contends in its Report on Remand that by dropping the practice of law requirement from Rule 46 we did not mean to permit the admission of applicants "without regard for whether the applicant actually practice law." We disagree; that is indeed what we meant. . . .**
>
> **The Committee further contends that admitting applicants who have not actively practiced law for five years may prove constitutionally infirm. According to this argument, a requirement that an applicant under Rule 46(c)(3)(i) be no more than a dues-paying member of another bar would be arbitrary and, thus, not rationally related to "an applicant's fitness or capacity to practice law. . . . Since active membership in the Bar, without more, is no indication of fitness to practice law, the Committee contends, admission on that ground alone might be deemed discriminatory as against applicants seeking admission under Rule 46 (c)(ii) . . . We find the Committee's argument to be flawed.**
>
> We do not share the Committee's view that active membership in a bar means nothing more than paying dues. We take judicial notice of the fact that some thirty-five jurisdictions in the United States now require Mandatory Continuing Legal Education ("MCLE") for active bar members . . . . Further, in many jurisdictions active membership in the bar entails responsibilities such as court appointments, listing with lawyer referral services, and client-fund handling regulations. . .
>
> .
>
> As is true of "bright line" rules generally, the "active member in good standing" test contained in Rule 46(c)(3)(i) is not perfect. It may result in the admission of candidates whose qualifications are less than ideal. Likewise, it may exclude candidates whose qualifications are otherwise exemplary. As the Supreme Court has said:
>
> > "if the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. . . .
> >
> > . . .
> >
> > As we said in . . ., "this court has previously noted that the term good moral character is of **broad dimension** and . . . can be **defined in many ways**."

The Committee argues that the Applicant was not truthful during the application process, and was evasive in two respects. First, his responses concerning the nature of his practice in Georgia. Second, his refusal to provide federal income tax returns. The Court initially addresses the heart of how nondisclosure or misstatements should be handled, but then avoids deciding the issue:

"Like other qualifications for admission, the requirement of good moral character is not standardless. **For an omission or misrepresentation to be evidence of an applicant's lack of moral fitness, the omission or misrepresentation must be material. . . . Counsel for the Committee and advocacy amici . . . both agree on this. They differ, however, on the test of materiality.**

Amici argue that for misrepresentations to be material, they must in fact be false. . . . According to amici, such omissions or misrepresentations must also be of the magnitude to indicate a lack of good moral character. . . . finally, amici contend that an intent to deceive is required. . . . Amici conclude by contending that since questions about "active practice" were irrelevant. . . .neither the Committee's questions nor . . . answers were "material" to his application. . . .

On the other hand, the Committee contends that misrepresentations and lack of candor are material . . . except perhaps when the subject of the questions is invidious or otherwise manifestly improper. . . .

We need not dwell on the issue of materiality and intent to deceive, however, because we are satisfied that <Applicant>. . . satisfied his burden of proving good moral character.
. . .
Momentary lapses of memory during an examination by five questioners do not a reasonable basis for a finding of evasiveness make." [221]

The Court rules in favor of the Applicant and orders that he be admitted. The opinion is nevertheless disappointing and frankly speaking, a bit cowardly. The Court outlined the opposing positions on the critical issue of materiality, and then simply dropped the matter stating, "We need not dwell on the issue of materiality." They should have decided the matter. Amici's position, which I subscribe to, asserts that if a question answered affirmatively will not affect the admissions decision negatively, then the failure to answer the question is not material. A nondisclosure in such an instance would not and should not reflect poorly upon moral character, since it is the question that is improper. The Committee's irrational definition of "materiality" ultimately has the result of substantially negating the concept of "materiality."

One last noteworthy point on the issues of candor, truthfulness and evasiveness with respect to this case. The Committee had interpreted Rule 46 to include a requirement of engaging in the active practice of law for five years. The express language of the Rule however, contained no such requirement. Their interpretation, conclusively held to be false by the Court, exemplifies how the Committee lacks candor, if their own standard of materiality is applied to their interpretation of the Rule. They were saying the Rule contained a requirement which it clearly did not. Were they lying? Apply the standard suggested by amici on the issue of materiality, we can let the Committee off the hook. It works better for everybody. But it's unfair to hold the Applicant to one standard of materiality and candor, while allowing the Committee to be held to a different standard.

596 A.2d 50 (1991)
630 A.2d 1140 (1993)

In 1977, while an employee of the Justice Department and evening law school student, the Applicant began using cocaine. By 1980, he was addicted and turned to dealing to support his habit. In 1984, he was convicted of conspiracy to possess cocaine with intent to distribute. The Committee recommended his admission. The Court however, disagreed in a 1991 opinion and denied admission. They felt denial was appropriate due to the relatively short period of rehabilitation compared with the three Applicants in the convicted felon cases. The distinction is valid and I do not believe the 1991 opinion in this case conflicts with the convicted felon cases.

Subsequent to his conviction, the Applicant began attending Narcotics Anonymous and Alcoholics Anonymous. He also volunteered in the Lawyers Counseling Program of the DC Bar. In comparing this case with the convicted felon cases the Court writes as follows:

> ". . . this court admitted to the bar three applicants who many years earlier had committed serious crimes. We reiterate strongly that . . . is not a signal that henceforth it will be relatively easy for persons who have committed offenses less heinous than manslaughter, armed robbery, or illegal drug transactions to become members of the District of Columbia Bar. . . . In general, "an applicant with a background of a conviction of a felony or other serious crime must carry a very heavy burden in order to establish good moral character. . . .
>
> . . . All three applicants had demonstrated their respective rehabilitations over a period of fifteen years or more from the time of their convictions until the time we admitted them. All had led exemplary lives for over eleven years from the time they had been released from the prison system. . . ." [222]

The Applicant in this case, subsequently reapplied for admission and received a unanimous recommendation from the Committee. The Court addressed his application in a second opinion in 1993 and granted admission. By then, the Applicant had been drug free for eight years, and participated in numerous community projects. I wholeheartedly agree with both of the Court's opinions pertaining to this Applicant. Sufficient time had lapsed since the conviction and rehabilitation had been demonstrated. Denial of admission was the proper decision in the first opinion, and the granting of admission was the proper decision in the second opinion.

614 A.2d 523 (1992)

IF THE COMMITTEE IS EVENLY DIVIDED,
JUST REPLACE THE MEMBERS VOTING IN FAVOR OF THE APPLICANT

The Applicant was admitted to the West Virginia Bar in 1980. He was suspended from the practice of law in 1985 because of his conduct in a Maryland case where he allegedly engaged in witness tampering. In 1987 he passed the District of Columbia bar exam. He disclosed his suspension.

Another attorney alleged the Applicant had contributed to the break-up of his law firm by encouraging former members to steal firm clients.

A Hearing was held on his character in 1988. The same attorney testified that the Applicant had engaged in the unauthorized practice of law in the District of Columbia after being suspended in West Virginia. Subsequent hearings were held, after which the Committee was evenly divided on whether to recommend admission. The Committee further investigated his conduct as an attorney. His representation of a criminal defendant had led to a charge of obstruction of justice against him. The Applicant was convicted by a jury, but the conviction was set aside by the trial court, and he was acquitted at a second trial. Prior to being indicted, he filed a civil suit against the local prosecutor and others seeking fifteen million dollars in damages. After acquittal, he pursued the claim and a directed verdict was entered in favor of two defendants, with the jury finding in favor of the third. Attorney fees were assessed against the Applicant.

In another case, he was sanctioned and the Court of Appeals affirmed the sanction. The Bar Committee requested his income tax records for the years 1982-1987 and discovered that he earned nearly the same gross income in the year he was suspended as in prior years. This information was used as evidence to support the allegation that he had engaged in the unauthorized practice of law. Three members of the Committee recommended in favor of admission, and three recommended against.

Now here's where it gets really interesting. Or perhaps I should say political, and "smelly." The Court determines in its first opinion that some crucial questions needed to be answered and therefore remands the case back to the Bar Committee. Footnote 8 of the opinion states as follows:

> **"We are aware that two members of the Committee who participated in the preparation of the recommendations have since been replaced.** Portions of the hearing may have to be reopened; however, we will leave that determination to the judgment of the Committee."

Apparently, the members that were replaced were the members who had recommended in favor of admission. After remand, the new Committee unanimously recommends against admission. In the earlier hearings, the Applicant's brother in law refused to endorse his application. The Applicant alleged his brother-in-law abused drugs. During the new hearings the Bar Committee confronted the Applicant regarding this allegation, but did not provide him with notice that it would be an issue. The Applicant challenges the fairness of the Committee's tactics and conclusions. The Court rejects the Applicant's argument stating:

> "The Committee was not required to give him notice of every question they might ask him. The underlying issue was . . . conduct and candor, and allegations such as he made . . . if unfounded, were relevant to the inquiry."

The Applicant's counsel files a motion to disqualify one of the Bar Committee members. The Committee then refused to allow his counsel to answer questions pertaining to the motion. They then coerced the Applicant into testifying about the motion. The Court discounts this objection on the ground that the Committee was in the best position to determine the Applicant's credibility. The

Applicant challenged the Committee's finding that he has a "history of engaging in witness tampering" and a "willingness to submit pleadings containing highly inappropriate personal attack." The Court states as follows:

> "While the finding of a "history" of witness tampering, supported by only one proven incident . . . may go too far, any exaggeration in this regard was harmless because past witness tampering played only a minor role in the Committee's recommendation. It rested instead primarily upon his practice, past and present, of "asserting improper personal attacks and making inappropriate allegations against others," and upon his lack of candor with the Committee."

The Applicant also asserted that the Committee's findings amounted to "impermissible discrimination," by "disciplining a black individual more harshly than a comparable white individual." The Court ruling in favor of the Bar Committee states:

> ". . . Despite his assertion that he has been forthright with the Committee in these proceedings, his filings with the Committee have exhibited a serious lack of candor. He has refused to accept responsibility for his conduct and shifted the focus at each opportunity to an asserted bias against him lurking in the Committee's proceedings and recommendation. In this sense his conduct parallels that of the applicant in . . . whom we denied admission substantially for those reasons." [223]

This case smells bad. The Applicant was never convicted of a crime. The only legitimate ground supporting denial of admission was the West Virginia suspension, but it was determined by both the Committee and the Court to not be a ground warranting denial. Although I am not so certain that I would have discounted the West Virginia suspension as readily as the Committee and Court, once it is eliminated, there is no valid reason to deny admission.

The changing of members on the Committee looks suspicious. The inadequacy of Notice looks suspicious and wreaks of deprivation of due process. The idea that notice requirements are satisfied just by indicating in a general manner that the issues to be examined were conduct and candor suffers from vagueness and ambiguity. It does not sufficiently apprise the Applicant of the matters that will be the subject of the hearing. The most disturbing aspect of the proceedings, is how the Bar Committee demonstrated a lack of candor by misrepresenting one incident of witness tampering as a "history" of witness tampering.

The Court analogized this case to *579 A.2d 668 (1990)*. The analogy is appropriate. As I indicated previously in that case, it also demonstrated a lack of candor on the part of the Bar Committee and was decided incorrectly. Both cases resulted in denial of admission based on attitude, rather than acts. In light of the individuals who were convicted of serious felonies and admitted (some of which as noted, I agree with the decision to grant admission), the denial of admission to this Applicant as well as the Applicant in *579 A.2d 668 (1990*) was wrong.

631 A.2d 45 (1993)

OH SISTER, SISTER

During law school, the Applicant served as co-chief justice of the law school's moot court program and shared access to the program's checking account. Between 1990 and 1991 he converted $ 3500 to his personal use. He disclosed his misconduct to a law school professor and to the Committee. After an investigation, the university was satisfied that he made full restitution and merely issued a letter of censure. The Bar Committee recommended in favor of admission, noting they were impressed by his honesty. The Court disagreed due to the short period of time since the misconduct.

It is a horrible decision. The Applicant was never convicted or charged with any crime. He made full restitution to the satisfaction of all parties involved and cooperated fully with the Bar Committee. This being the case, what we are left with is an Applicant who has an otherwise sparkling record and no convictions. He made one stupid screw up as a Nonattorney. It certainly wasn't the brightest thing in the world to do, but also not that horrible.

It is noteworthy that his reasons for taking the money, were not wholly without basis. He took $ 1,000 to pay Bail for one of his sisters, and $ 750 to lend another sister so she could leave an abusive husband. These facts in no manner excuse the misconduct, but they are mitigating. The Court's opinion flies directly in the face of the convicted felon cases in 1988, the 1993 convicted felon case, and the convicted felon case following in 1994. It does however confirm once again the arbitrary nature of the admissions process, which is devoid of consistency. [224]

649 A.2d 589 (1994)

THE FAMILY BUSINESS

In 1977, when the Applicant was eleven years old his mother and father started an escort business. In 1982, when he was sixteen years old, he began assisting by answering telephones. He continued through his second year of college. In 1985 at the age of nineteen, he began assisting his uncle with marijuana farming. Shortly thereafter, he was indicted on federal charges related to the marijuana operation. He pled guilty in 1987 at age twenty one. He received a suspended sentence and was placed on probation for five years. That same year he was convicted of aiding and abetting interstate prostitution. The Court suspended sentence and placed him on two years probation.

The Court grants this Applicant admission to the Bar on the ground that the conduct giving rise to his conviction occurred approximately ten years previously. In addition, the Court notes that the conduct occurred prior to law school during the teenage years of sixteen to nineteen.

I view the applicable time periods, for purposes of assessing rehabilitation differently than the court. The period of time to be measured should be from the date of the conviction, not the date of the conduct. The fact the conduct occurred prior to law school is irrelevant, but the fact that it occurred during the teenage years is very relevant. This is because logic dictates that adults be held to the same standard whether they are in law school or not. Conversely, Non-Adults (teenagers) have historically been granted a degree of leniency in our justice system. This case is a very close call. Measuring from the date of conviction to the date the Bar Committee issued its positive recommendation is about six years. Measuring to the date of the Court's opinion is about seven years. The crimes are very serious, but do not involve honesty. They are also not violent crimes or armed offenses.

Admittedly, with some hesitation, and particularly due to the age during which the conduct took place, I would give the Applicant the benefit of the doubt and admit him just as the Court did. I do so however, based on a substantially different analysis. Specifically, I consider the Applicant's age when the conduct took place for purposes of mitigation, but I measure the time period from the date of conviction rather than the date of conduct for purposes of assessing rehabilitation. Ultimately, I arrive at the same conclusion, and probably with the same degree of uncertainty the Court had. In any event, the major problem with the Court's opinion, is that it is wholly inconsistent with their opinion in *631 A.2d 45 (1993)* where an individual who had never been convicted of a crime was denied admission.[225]

District of Columbia Court of Appeals, No: 01-BG-192 (Mar. 22, 2001)

The Applicant passed the 1998 Bar exam. In 1992, he had pled guilty to conspiracy to distribute marijuana for which he was sentenced to a year of incarceration. The admissions committee recommends in favor of admission and the Court agrees. I too agree, and further believe the opinion written by the Court is excellent in virtually all regards. In fact, it is one of the best admission opinions that I've come across.

The Court focuses on the length of time since his conviction which was almost ten years and the fact that he engaged in no other criminal conduct during that time. The crime itself, while serious, was not violent or particularly heinous in nature. More than anything else, it was just stupid. Additionally, the Court notes the criminal conduct occurred when the Applicant was approximately age 20, and that he had engaged in some community service as evidence of rehabilitation.

The opinion in this case is important because it is one of the few cases in the contemporary McCarthylike Bar admission environment, in which an Applicant with a criminal conviction is admitted. The Court also notes that the Florida Bar had denied admission to this Applicant on moral character grounds. I believe the DC Court of Appeals is to be strongly commended for, substantively and properly ignoring the ridiculous conclusions and irrational decision made by the Florida Bar and State Supreme Court.

The DC Court of Appeals in this case arrives at the right decision and for precisely the right reasons. It's a pleasant rarity to read a Bar admission opinion like this one. [226]

DELAWARE

464 A.2d 881 (1983)

DOES NONDISCLOSURE OF INCIDENTS BEARING <u>POSITIVELY</u> UPON YOUR CHARACTER CONSTITUTE LYING ?

The Applicant, a Maryland attorney filed an application for admission in 1982. The application included a catchall character question previously referred to herein, as a GAQ (Garbage Admission Question). The question stated:

> "31. Is there any other incident in your background, not otherwise referred to in the answers to this Questionnaire, which may have a bearing upon your character or fitness for admission to the Bar ?"

The Applicant answered the question, "No." Four days before filing his application, he met with a Delaware attorney who was to be his preceptor. Delaware required the certificate of a preceptor for admission. The preceptor was typically a Delaware attorney that performed a limited character review and served as the Applicant's sponsor. After meeting with the potential preceptor (PCR hereafter), the PCR contacted the Maryland Commission as a routine matter to request information which might assist him in assessing the Applicant's moral character. Typically, the reason for such an inquiry would be to uncover negative information such as ethical complaints. The Maryland Commission advised the PCR that a waiver from the Applicant was necessary before it could release any information. The PCR requested a waiver from the Applicant. The Applicant submitted a carefully worded waiver authorizing the Commission to:

> "advise . . . as to whether or not there have been any charges, past or pending, made by this office against me to the Maryland Court of Appeals and as to whether at any time my license to practice law in Maryland has been suspended, revoked, or if there have been any public sanctions issued against me."

The Commission in response informed the PCR that there were no public sanctions issued against the Applicant, nor any charges, past or pending, in the Maryland Court of Appeals, but that because the waiver was limited to public matters the Commission could not inform him of other complaints. To do so, it required a broader waiver. The PCR then obtained a broad and unequivocal waiver from the Applicant and the Maryland Commission informed the PCR of five ethical complaints. One resulted in a private reprimand, three resulted in a warning, and one was pending. The Delaware Board concluded that the Applicant's explanations were "disingenuous" and stated that his:

> ". . . lack of candor and forthrightness with respect to the Maryland ethics charges has manifested itself in the following critical respects:
>
> a. Although he believed that the Board required disclosure of the Maryland ethics charges in response to Question 31 of his application . . . intentionally did not disclose that information in response to that question;
>
> b. . . . intentionally did not tell . . . of the existence of the Maryland ethics charges;

c. . . . submitted an artfully drawn waiver drafted in a way he knew would not permit the disclosure of the Maryland ethics charges;

d. offered testimony attempting to justify the foregoing instances of lack of candor on ground that were neither credible nor forthright."

The Applicant attempted to justify his nondisclosure of the Maryland ethics charges on the basis that they did not have a bearing upon his character. He asserted that responding affirmatively to Question 31 would have implied that his prior actions were unethical. He further indicated that he assumed in the ordinary course of processing his application inquiry would be made and any questions raised could be properly reviewed. Thus, he contended an affirmative answer to Question 31 superfluous. The Court rules in favor of the Board and denies admission. It applies the concept of materiality in the narrowest manner possible stating:

> ". . .<Applicant> suggests that **the Maryland ethics charges, even if they had been fully disclosed, were not of sufficient gravity to warrant denial of his application. But we do not address that.** Any such question was rendered irrelevant by . . . conduct. Instead, the issue is one of integrity, based on . . . concealment, which he materially compounded by the disingenuous explanations he later offered.
> **. . .**
> Any lessening of this standard would permit an applicant subjectively to relate past events in such a manner that the Board could not properly perform its duties under Supreme Court Rule 52(a)(1). Thus, it is not proper for an applicant to give either a highly selective or sketchy description of past events. . . . An applicant who violates this rule may be denied admission to the Bar."

The opinion is pure crap. Its' irrationality can be exemplified as follows. First, let's review the application question again. It states:

> "31. **Is there any other incident in your background,** not otherwise referred to in the answers to this Questionnaire, **which may have a bearing upon your character** or fitness for admission to the Bar?

The operative phrase in the question is "which may have a bearing upon your character." Take note, the question does not limit itself to any time frame and therefore encompasses incidents that occurred when the Applicant was a child. Further take note, the **question does not limit itself to those incidents that bear negatively on an Applicant's character.** It incorporates incidents that reflect positively on one's character. Applying the Court's irrational reasoning, an Applicant who fails to disclose that they perform charitable work would be denied admission for failing to disclose such. An Applicant who once saved someone's life that fails to disclose such, similarly. The vagueness, overbreadth and ambiguity in the question could not possibly be more monumental. It is a constitutionally infirm question in violation of the First Amendment. Two other phrases in the opinion warrant analysis. Attempting to justify its' irrationality the Court contends:

> "Any lessening of this standard would permit an applicant subjectively to relate past events"

The Court then states in the case of such nondisclosure:

"An applicant who violates this rule **may** be denied admission"

The operative term is "may." According to the Court, denial of admission, is thus not certain when nondisclosure occurs. It only "may" be denied. The term imposes a discretionary standard, rather than the obligatory duty that would be imposed by the word "shall." There are two logical problems with this. First, while the Court purports to prohibit an Applicant from answering the question based on subjective interpretation, it inconsistently grants the Bar the ability to subjectively assess the impact of nondisclosure by using the term "may" instead of "shall." More importantly, by using the term "may" the Court negates its' own statement that failure to disclose renders the impact of the answer's substance irrelevant. Remember, the opinion stated:

> ". . . suggests that the Maryland ethics charges, even if they had been fully disclosed, were not of sufficient gravity to warrant denial of his application. But we do not address that. Any such question was **rendered irrelevant** by . . . conduct." [227]

If indeed the impact of nondisclosure was **"rendered irrelevant**" then any Applicant who violated the rule should definitely be denied admission. But the phrase used was <u>may be denied</u>, so application of the discretionary standard, must inescapably be predicated on the substance of the answer.

In sum, the opinion contradicts itself. In addition, the question is patently unconstitutional because it is not limited to a time period and not limited to incidents reflecting negatively on character.

475 A.2d 349 (1984)

THE LEGAL ETHICS PROFESSOR

The Applicant was a member of the Pennsylvania Bar for over nine years and a law school professor from 1977-1980. Ironically, he taught a course in legal ethics. In 1982, he applied to the Delaware Bar and was denied admission on character grounds for lacking truthfulness. The Board found that during 1981 while employed by a Delaware attorney, he went to a car dealership that was the plaintiff in a lawsuit brought against a client of the firm. He represented himself as an official from a state consumer agency to gain information, even though he knew the dealership had retained counsel. He admitted this misconduct to the Board, but claimed he was under the influence of alcohol at the time. He also apparently borrowed $ 2500 from a close personal friend, but did not pay it back immediately. Nasty words were exchanged between the two. The Board further noted that although he was not admitted to practice law in Delaware, he appeared pro hac vice before various Delaware courts on 24 occasions. He did so after receiving notice of an Order specifically prohibiting him from further appearances. The Applicant asserted that the Board failed to fully advise him of the subject matter of the Hearing, thereby violating notice requirements of the Board's own rules. He contended the Board erroneously measured his moral character. He also contended the Chairman of the Board failed to recuse himself despite personal knowledge of disputed facts. The Court rules in favor of the Board on all issues.

This case is a bit difficult for me. It hinges on the issue pertaining to the unauthorized practice of law (UPL). Generally speaking, I believe many UPL prohibitions are anticompetitive and infringe on First Amendment rights. Nevertheless, if the Court did enter an Order against the Applicant, he had an obligation to comply with it, unless he was challenging it's constitutional validity. The opinion clearly states he made no attempt to obtain suspension of the Order. This troubles me. By the same token, the question plagues my mind that if he truly did violate the order, then why wasn't he held in contempt? Some facts seem to be missing here.

Similarly, the Board's emphasis on the personal loan issue troubles me, because the Board apparently concluded that his broken promise amounted to fraud. That is a great deal of overstretching by the Board. If in fact, it was "fraud" then why didn't the Board fulfill its' duty to refer the matter for prosecution? The answer is obviously that the Board wanted to make it appear to be "fraud" for purposes of the admissions process, but really knew it didn't meet the legal elements for a "fraud" prosecution.

In sum, I am uncomfortable both with the Applicant and the Board. They both seem to lack candor. I am concerned that if the Applicant really did the things the Board says he did, he should have been prosecuted. I sense the Board is overstating matters to fit their decision, but by the same token there are facts incriminating to the Applicant. Important facts seem to be missing from the Court's opinion. I am unable to make a decision on this case without having the benefit of the record before the Board, since the matters outlined in the Court's opinion do not seem to present fully the position of both parties. [228]

553 A.2d 1192 (1989)

THE ALL TIME BIGGEST BAR ADMISSION WHOPPER OF A LIE

This case is incredible. The Applicant, a Lieutenant in the Military Intelligence Branch of the U.S. Army Reserve was found guilty of plagiarism while in law school. He was suspended for one semester and disclosed it on his Bar application. A Hearing was scheduled. He testified that the plagiarism incident was a cruel hoax perpetrated against him by a fraternity for which he had been dormitory supervisor. He then claimed that his version of the episode was verified by the U.S. Government prior to granting him a top secret security clearance.

Now, the guy goes all the way. The Hearing was scheduled for July 1, 1988. The Applicant presented the Board with a letter purportedly signed by a U.S. Army Brigadier General. It had a return address on it. He also submitted memorandum, purportedly signed by a U.S. Army Captain with the same return address. The memorandum referred to three confidential documents which were allegedly the product of the U.S. Government's investigation of the plagiarism incident. It further stated that these documents had been taken from files of the Central Intelligence Agency.

After the Hearing, a Board member wrote a letter to the Army Captain requesting he contact the Board to arrange an appearance. The Board member had the letter hand-delivered to the return address on the envelope. It was discovered that the return address was actually the location of a privately-owned commercial "post office" that rented out mailbox numbers. On July 12, 1988 the Board member wrote the Applicant by certified mail informing him that the Panel would give him additional opportunity to authenticate the memorandum. The return receipt indicated the letter was delivered on July 13. The next day July 14, an envelope addressed to the Board member was received at the post office. The envelope contained a letter dated July 11 and an affidavit purportedly signed by the Army Captain. It stated:

> "As you know, I will not be able to appear before the Board of Bar Examiners of the State of Delaware.
>
> I have therefore prepared an affidavit which will supply the Board with the necessary authentication of my correspondence of June 30, 1988."

The affidavit was purportedly notarized by a District of Columbia notary public. That same day, a member of the Board received a letter from the Deputy General Counsel of the Central Intelligence Agency which stated:

> "The Central Intelligence Agency has no record of . . .<Applicant> . . . currently holding a security clearance, having been a subject to a background investigation by this Agency, or of any past or present association between . . . and the CIA. Furthermore, the copy of the letter he sent you on letterhead using the CIA's seal and name, appears to be a forgery; no such stationery is in use by this Agency. In addition, there is no record in this Agency of the individuals who allegedly signed the documents . . . provided to you ever having been employed by this Agency . . .
>
> I hope this information is of use to you. This Office intends to report this matter to the U.S. Department of Justice as a possible violation . . . ." [229]

Later that same day, the Board member received a letter by telecopy from the Assistant to the General Counsel of the Department of the Army informing the Board that the United States Army had no record of either the alleged Brigadier General or the Captain being in either the active or reserve components of the Army. The Board then learned there was no Army unit containing the designation given by the Applicant and that the District of Columbia had no record indicating the existence of the Notary Public.

Subsequently, the Board confronted the Applicant who withdrew his application. Prosecution of the Applicant was then pursued. The facts of the case are obviously quite incredible. In light of existing Bar rules, there is no doubt that the Board did exactly what they should. This Applicant irrefutably should not be an attorney.

I present this case for a particular reason. It exemplifies a flaw in the objective standard I have proposed, that an individual never convicted of a crime and never professionally disciplined should presumptively be determined to pass the moral character standard. The Applicant in this case satisfies my proposed objective standard, but basic common sense indicates he should not be an attorney. It is conceded that my objective test would have resulted in admitting this man and he obviously is not morally qualified. My objective test fails with respect to this Applicant.

No system is absolutely perfect. I must own up to the fact that using my system, there will be a certain number of people admitted who shouldn't be. Similarly, under the current system there are countless individuals who are admitted and immediately proceed to steal funds from client trust accounts. Overall however, when balancing out the number of people that would be wrongly admitted under my objective standard, against the number of people unjustly denied admission under the Bar's current subjective standard, plus the number of people wrongfully granted admission under the Bar's current subjective standard, the benefits of having an objective standard far outweigh the detriments. It is not a perfect system, but it is an immensely better one.

After an individual is admitted, they can be disbarred. To the limited extent my objective standard results in the admission of morally unqualified individuals, as would have concededly occurred in this case, they will be subject to disbarment as soon as they step out of line. Conversely, the unjust denial of admission of many morally qualified individuals deprives those Applicants of a career, and the clients they would have served of a good attorney. In addition, the current subjective nature of the character process allows the application of a lenient standard upon the Bar, and a strict standard upon the Applicant. This makes the Judiciary branch look hypocritical and lacking in candor.

Ultimately, the viability of any proposed system must be viewed by balancing the benefits against the detriments. Overall, an objective standard is better than a subjective one. By the same token, I do concede that as illustrated in the foregoing case, there will be a certain number of Applicants who will be admitted that should not be. Frankly speaking, I believe the number of individuals who would concoct a story like this Applicant did is fairly small. It's definitely a Whopper.

561 A.2d 992 (1989)
583 A.2d 660 (1990)
143 E.D. PA Sup. 84 (1985)
877 F.2d 56
826 F.2d 1056
875 F.2d 311
625 F. Supp. 1288, 884 F.2d 1384
Civil Action 91C-03-255 (1992)

SET-UP AND AMBUSHED BY THE LAW SCHOOL

This is a sad series of cases concerning one Applicant victimized by the irrationality of the Bar's admission process. The Applicant when applying to law school in 1979 answered "no" to a question asking if he had ever been a patient in a mental, penal or correctional institution. The accuracy of his answer became an issue of dispute. Although he had been institutionalized in 1975 in a mental institution, it was voluntary. The law school which seemed to have a personal vendetta against the Applicant, later sabotaged his hopes of becoming an attorney by communicating to various state bar examiners that the answer he gave was incorrect. Ultimately, he was denied admission to numerous State Bars.

He then sued virtually everyone in sight. As one of the Court opinions states, "An avalanche of litigation . . . ensued." This case became a hot topic in the media. In 1990, The Philadelphia Inquirer published an article detailing the controversy, "1 answer thwarts his law career." The Applicant filed a complaint with the Office for Civil Rights of the U.S. Department of Education which concluded that the question violated federal law. Several law schools indicated that it was debatable whether the law school should have notified the bar examiners. One Stanford University law professor stated:

> **"This is not only an inappropriate question, this is a cruel question. . . . It's putting cruel pressure on people to lie**. . . . I would be very, very reluctant to tell the bar."

A law professor from the University of Pennsylvania stated that:

> "We probably would have decided that this is a kid,. . . It was a stupid thing . . . a foolish peccadillo."

After graduation, he applied to the DC Bar. In 1983, he applied to the Pennsylvania and New Jersey Bars and later to Maryland and Delaware. Each time he passed the written section of the Bar exam, but when the law school's letter was sent to the Bar examining committees, the approval process slowed to a crawl. They were clearly conducting themselves in an irrational, vindictive manner out to get him. Pennsylvania, Washington and Maryland refused to admit him.

His dispute with the New Jersey Bar was most amazing. In the spring of 1983, he passed the written section. In April, 1984, it seemed his dream had come true. The clerk of the New Jersey Supreme Court issued him the official certificate, in Gothic print and sealed with the court's gold emblem stating his name and that he was:

> ". . . constituted and appointed an Attorney at Law of this state on April 2, 1984"

He then received a certificate of good standing from the Supreme Court of New Jersey dated April 25, 1984. **Days later however, he received a one page letter from the New Jersey Supreme**

Court that there had been a mistake and the certificate was sent to him in error. The letter indicated it was void and he had no right to practice law. That smells real bad. The Bar's Character Committee apparently was still reviewing whether he was fit to be an attorney. The New Jersey Character Committee's transcripts showed that the letter from the vindictive law school was the central issue blocking his application. During the hearings, there was no suggestion that he misled the examiners. A New Jersey Committee member told him that she was concerned about his inclination to file lawsuits. Another member asked him if his past mental health problems influenced "your filing of lawsuits at the present time or your feeling of persecution that may be existing at this time." He filed during the period, approximately 20 - 30 lawsuits, each time representing himself.

This series of cases reminds me very much of the Arizona Ronwin case. It is a perfect depiction of the improper use of a subjective standard. This Applicant was never convicted of a crime. He just was not willing to play ball with the Bar examiners like they wanted. He wouldn't submit his will to them and instead took them to Court. They responded in an irrational manner by punishing him in the form of denying admission. They ostensibly predicated denial on the assertion that his answer to one question lacked candor. In truth however, his attitude and voluminous record of instituting litigation. He graduated from law school in 1979. Eighteen years and dozens of lawsuits later he was still trying to get into a State Bar with the most recent case coming to this author's attention dated June, 1997.

In 1992, the U.S. Supreme Court in *Martin v District of Columbia Court of Appeals*, 506 U.S. 1 (1992) rendered the following "Per Curiam" opinion regarding this Applicant:

> "Pro se petitioner . . . requests leave to proceed *in forma pauperis*. . . . We deny this request pursuant to our Rule 39.8. Martin is allowed until November 23, 1992, within which to pay the docketing fees. . . . We also direct the Clerk not to accept any further petitions for certiorari from Martin in noncriminal matters unless he pays the docketing fee. . . .
>
> Martin is a notorious abuser of this Court's certiorari process. We first invoked Rule 39.8 to deny Martin *in forma pauperis* status last November. . . . At that time, we noted that Martin had filed 45 petitions in the past 10 years, and 15 in the preceding 2 years alone. . . . all of these petitions were denied without dissent. . . . "he has repeatedly made totally frivolous demands on the Court's limited resources." . . . Unfortunately, Martin has continued in his accustomed ways.
>
> Since we first denied him *in forma pauperis* status last year, he has filed nine petitions for certiorari with this Court. . . ."

Justices Stevens and Blackmun filed a Dissenting opinion regarding the above Order. They wrote as follows:

> ". . . The theoretical administrative benefit the Court may derive from an order of this kind is far outweighed by the shadow it casts on the great tradition of open access that characterized the Court's history prior to its unprecedented decisions in *In re McDonald*, 489 U.S. 180 (1989)(per curiam) and *In re Sindram*, 498 U.S. 177 (1991)(per curiam). I continue to adhere to the views **expressed in the dissenting opinions** filed in those cases. . . ."

The case cited above by the Dissent, *In re Sindram*, 498 U.S. 177 (1991) included the following Dissent by Justices Marshall, Blackmun and Stevens:

> "Moreover, indigent litigants hardly corner the market on frivolous filings. We receive a fair share of frivolous filings from paying litigants. Indeed, I suspect that, **because clever attorneys**

> **manage to package these filings so their lack of merit is not immediately apparent**, we expend more time wading through frivolous paid filings than through frivolous *in forma pauperis* filings. . . .
> **. . .**
> . . . Our longstanding tradition of leaving our door open to all classes of litigants is a proud and decent one worth maintaining. . . .
>
> . . . As Justice Brennan warned, "if . . . we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim." *In re McDonald*, supra, 489 U.S. at 187. By closing our door today to a litigant like . . . we run the unacceptable risk of impeding a future Clarence Earl Gideon. **This risk become all the more unacceptable when it is generated by an ineffectual gesture that serves no realistic purpose other than conveying an unseemly message of hostility to indigent litigants**."

One final note about the Bar application question that gave rise to this series of cases. What business is it really of the Bar whether an individual has received psychiatric assistance? By incorporating the topic into the Bar admission process, the Committee creates an incentive for a prospective lawyer to decline seeking psychiatric help when they need it, since it may adversely affect upon their Bar application. That is wrong, unjust, unconstitutional and as the one law professor said, "cruel." In this regard, it typifies the Bar admissions process. By the mid 1990s many cases addressed this issue and the question has arguably been found to violate the American with Disabilities Act (ADA).

Plus, let's face it. No one's more Nuts than attorneys generally, and the State Bars specifically.[230]

FLORIDA

397 So.2d 673 (1981)

DON'T YOU KNOW THAT WE DON'T CARE WHAT JURIES SAY?
WE'RE THE FLORIDA BOARD OF BAR EXAMINERS.

The Applicant, a female was charged with shoplifting and acquitted. The Board denied her admission on the ground that she was guilty of the charge, notwithstanding her acquittal. They also concluded that she lied to the Board by professing innocence. She appeals and the Florida Supreme Court rules in her favor. The primary issue was whether denial of an allegation for which one was acquitted, can still be deemed to constitute "lying." The Court writes:

> **"Petitioner's jury acquittal . . . has special significance with regard to the Board's conclusion that petitioner lied three times in asserting her innocence**. That is, the jury's conclusion vindicated petitioner's declaration of innocence of the crime charged before and at the jury trial. Her **acquittal would continue to justify her protestation of innocence at her subsequent Board hearing,** even though the Board might have thought it advantageous to make a showing of repentance."[231]

Supreme Court of Florida, Docket No. 63,161 ; Versuslaw 1983.FL.622

YOU DO HAVE A RIGHT OF PRIVACY.
IT JUST DOESN'T APPLY IN OUR BAR ADMISSION PROCEEDINGS.

This case is a good follow up to the Delaware case dealing with unconstitutional application questions pertaining to Applicants that receive counseling. The Applicant applied to the Florida Bar, but refused to answer question 28(b), which inquired:

> "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?
>
> Yes or No
>
> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)"

The Florida Board refused to process his application until he answered the question. He sought review by the Supreme Court of Florida on the ground that the Board's action violated his right of privacy and his right to due process of law. The Court irrationally rules against the Applicant. It determines that his right of privacy is implicated by the question, but then states:

"The extent of his privacy right, however, must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances. He has chosen to seek admission into the Florida Bar. **He has no constitutional right to be admitted to the Bar. Rather, the practice of law in this state is a privileg**e. . . . In this case, the applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right."

The Court's decision is predicated on their false determination that the ability to practice law is a privilege, rather than a right. As previously discussed herein, the U.S. Supreme Court has held otherwise, on numerous occasions. The Florida Court's opinion was therefore nothing short of a usurpation of the U.S. Supreme Court's authority, that violated the rule of law. A Dissenting opinion is filed that states:

". . . I agrees with the majority that the state's interest in ensuring that only those fit to practice law are admitted to The Florida Bar is a compelling state interest. However, I must agree with the petitioner's assertion that the authorization and release form and item 28(b) are unnecessarily overbroad. . . . **At a minimum I feel there must be some time frame incorporated in question 28(b)** . . . In addition, I feel the form of the question seeking information . . . could be phrased in terms which elicit information with regard to problems which, . . . impact on one's fitness to practice law. . . ." [232]

650 So.2d 34 (1995)

CATCH-22

The Applicant, a female, was denied admission due to an incident in which she allegedly cheated in law school. She fully disclosed it on her Bar application. She also had disclosed it on an application to the New Jersey Bar and was admitted. The Florida Board however, determined that her continued protestations of innocence, notwithstanding her open disclosure of the allegations, constituted "lying." The Court properly disagrees with the Board's irrationality, writing:

"<Applicant> did not deny or conceal the cheating incident. There is no record evidence that <Applicant> lied or was less than candid to the Board. She admitted the incident, but maintains her innocence, which is consistent with the agreement that she entered with the university. The Board is recommending denial of admission because she steadfastly maintains that she did not cheat on the exam. However, <Applicant> protestations of innocence explain both her answers on the bar application and her testimony to the Board. Thus, **the Board has presented <Applicant> with the ultimate Catch-22: by maintaining her innocence, <Applicant> can never meet the Board's standard of candor."** [233]

Supreme Court of Florida, No. 86,148 ; Versuslaw 1996 .FL. 798 (1996)

IT'S NOT ENOUGH TO DISCLOSE.
YOU HAVE TO DISCLOSE THE <u>WAY</u> WE WANT YOU TO.
SO MAKE SURE YOU GUESS CORRECTLY ABOUT HOW WE WANT YOU TO DISCLOSE

The Applicant was denied admission on moral character grounds. While an undergraduate in 1988, he was arrested for petty theft, pled no contest and was placed on probation. Thereafter, a civil suit was instituted against him related to the theft and a judgment entered in the amount of $ 1500. He disclosed the matter on his application, but was found to lack candor since he did not provide a sufficiently detailed response in the form preferred by the Board. That smells bad.

In 1990, he was detained for driving with a suspended license. His license had been suspended in January, 1990 but reinstated in March, 1990. The detention also occurred in March, 1990 the month of reinstatement. He disclosed the incident and asserted the police officer "erroneously believed him to be in possession of a suspended drivers license." In addition, he had been cited for sixteen traffic violations.

The Court denies admission. It does so based on the petty theft incident which occurred eight years earlier in 1988. The Court rendered a very poor opinion. He definitely should have been admitted. Eight years had passed. It was one minor incident and he was a young student at the time. The traffic citations are irrelevant. Absolutely no valid reason to deny admission. The fact that the Bar Committee found him to lack candor because they didn't like the way in which he disclosed matters and felt his disclosures lacked sufficient detail, reflects poorly on the Committee's character, not the Applicant. It demonstrates the State Bar's propensity to falsely overstate the severity of an issue.

To this extent, specifically due to their groundless assertion that he lacked candor, the Committee itself lacked candor which could reflect on their moral character. [234]

Supreme Court of Florida, No. 91,134; Versuslaw 1998.FL.1830 (1998)

YOU LIED TO US BY TELLING US YOU DIDN'T LIE

The Applicant allegedly cheated on the Bar exam in 1988 and his scores were impounded. He then filed an updated application in 1994 and appeared for a Hearing on his character in 1996. The Board alleged as follows regarding the Applicant:

1. Cheated on the 1988 Multi-state Bar exam
2. Made false statements in support of a claim for unemployment benefits in another state while attending law school in Florida.
3. Falsely denied cheating on the 1988 Bar exam
4. Lied about his visual acuity
5. Made false statements regarding an insurance surcharge that resulted in the suspension of his driving privileges in another state
6. Assaulted an individual with a gun and damaged the individual's truck (charges dropped)
7. Made false statements on his bar application regarding the alleged incident of assault
8. **Made false statements regarding his reasons for not pursuing his initial bar application**
9. Made false statements on a homeowner's insurance application
10. Financially irresponsible with regard to student loans and consumer credit accounts
11. **Invested money in a house, instead of using it to pay his debts**

In reference to the alleged cheating incident the Court states:

> "The proctor testified that during the afternoon session of the exam, he saw <Applicant>. . . looking back and forth between his answer sheet and the answer sheet of the applicant sitting at the table ahead of him and to his left. He also testified that . . . appeared to have moved his chair six to eight inches toward the center of the table--closer to the answer sheet of the suspected source. . . ."

A purported expert testified that the degree of similarity between the Applicant's responses and the suspected source was well outside the degree normally expected to occur by chance. The expert also testified that of fifteen erasures, fourteen were to change an answer to that given by the suspected source. The Court states in reference to the Board's assertion that he falsely denied cheating:

> "The Board is certainly justified in requiring absolute candor from applicants for admission and in considering a lack of candor when making its recommendation. **However, a charge and finding that an applicant falsely denied an act which, . . . had not yet been proven, puts the applicant between the proverbial "rock and a hard place,"** with a choice either to maintain innocence and fail to meet the Board's standard of candor or admit the charge, though it may not be true, and relieve the Board of its burden of proof in the bar admission proceedings." [235]

The Court cites three other cases in which the Florida Board irrationally concluded that an Applicant lied simply by denying allegations. Ultimately however, the Court rules in the Board's favor and denies admission based on the cheating incident and the alleged assault. I would admit the Applicant. He has never been convicted of a crime or professionally disciplined based on facts set forth

in the opinion. **It is particularly troubling to me that the Florida Board persists in finding that when one denies an allegation, the denial itself constitutes lying.** While doing so once, although incorrect might be understandable, the Board's failure to **rehabilitate** itself, coupled with its' failure to obey State Supreme Court's opinions on the issue demonstrates a marked disregard and lack of respect for the rule of law. The Florida Board was usurping the authority of the Florida Supreme Court by continuing to disobey that Court's holdings.

A ridiculous assertion was made by the Board that the Applicant should have paid his debts rather than investing in a house. It is none of the Board's business how an Applicant handles their own personal financial affairs, so long as within the law. The Applicant committed no illegal act with respect to his debts. The issue does demonstrate how the Bar wants their fingers in all personal aspects of an Applicant's life. Finally, the alleged assault incident is irrelevant. If the Applicant had been prosecuted and convicted, I would immediately agree to denial of admission. Absent a conviction however, all that exists is a mere allegation. Similarly, the cheating incident was not conclusively proven. It was predicated on assertions that the Applicant moved his chair, raised his head, and the testimony of a purported expert witness who was obviously paid to promote the Board's position. In light of the Board's transgressions which demonstrate a marked lack of respect for State Supreme Court opinions, by their continuous irrational insistence that Applicants lie merely by claiming to be innocent, the Board's credibility on the cheating issue is extremely circumspect.

I would admit the Applicant and Suspend the Board from the practice of law, for a period of two years with reinstatement contingent on their demonstrating the proper degree of rehabilitation, remorse and willingness to comply with State Supreme Court rulings.

1. Supreme Court of Florida, No.SC95286; Versuslaw 2000.FL.0043403 (2000)
2. Supreme Court of Florida, No.SC95308; Versuslaw 2000.FL.0043745 (2000)
3. Supreme Court of Florida, No.SC95835; Versuslaw 2000.FL.0043747 (2000)
4. Supreme Court of Florida, No.SC95855; Versuslaw 2000.FL.0046466 (2000)

The four cases listed above involve four separate Applicants. The cases all have certain things in common. First, in each one of these cases, the Bar denies admission based on alleged conduct even though licensed Florida attorneys and Judges are either not prohibited from engaging in the same conduct or would not be disbarred for such. Rationality therefore mandates the conclusion that Florida Bar Applicants are held to a higher standard of moral conduct than licensed Florida attorneys and Judges. It must then be accepted that all of the State Supreme Court's statements that these individuals should be denied admission in order to protect the general public are nothing more than a bunch of Bullshit. Stated simply, the Supreme Court lacks candor when making such statements, because if in fact protection of the public interest mandates denying these Applicants admission, then it similarly mandates disbarring licensed Florida attorneys and Judges who engage in the exact same conduct.

The second similarity of these cases is that the State Supreme Court relies on an irrational process of accumulation of conduct to deny admission. Essentially, the concept is that although a particular instance of conduct does not constitute grounds for denying admission, when combined with other similar conduct, admission denial is warranted. The logical flaw in this reasoning is that zero plus zero does not equal one. An instance of conduct either constitutes grounds for denying admission (such as criminal convictions) or it does not. The concept of accumulating various types of conduct which standing by themselves do not justify denial, for the purpose of transmogrifying their nature to then justify denial is ridiculous. Such trickery and deception reflects adversely on the moral character of the Bar and State Supreme Court.

It is particularly noteworthy that a major contested issue in these cases, is whether the Applicant really did engage in the alleged conduct. Just because the Bar concludes they committed the conduct in question, does not in fact mean the Applicant did so. Keep in mind, that if the Bar is amenable to holding Applicants to a higher standard of moral character than licensed attorneys and Judges, they probably would also be willing to reach unsupported and false conclusions that Applicants committed alleged conduct. Interestingly, the Supreme Court's opinion in each of the above cases, fails to disclose sufficient facts justifying the conclusions reached by the Bar. Instead, the Court relies for the most part on the Bar's self-serving conclusions. For ease of reference, I refer to each Applicant by the SC number delineated above.

In SC95286, the Bar denied admission based on the following alleged conduct of the Applicant :

1. In 1989, eight years prior to the date of his Bar application, the Applicant damaged a door in his fiance's father's home after the father's dog tried to attack his fiance's pet chinchilla. Charges dropped.
2. Applicant shot and killed the dog that attacked his fiance's pet chinchilla. Charges dropped.
3. In 1987, twelve years prior to the date of his Bar application, arrested for DUI on two separate occasions. Charges dropped with respect to first, and he was acquitted at trial with respect to second.
4. One year after filing his Bar application, and while application was pending, arrested for DUI. Not prosecuted.

The conclusion that must rationally be reached in the case of SC95286, is that unless the State Bar and Supreme Court disbar Florida attorneys and Judges for mere arrests, without convictions of crimes alleged, the Bar Applicant is held to a higher standard of conduct that the licensed Florida attorney or Judge.

In SC95308, the Applicant filed an application in 1995. The Bar denied admission based on the following alleged conduct of the Applicant:

1. The Board determined that Applicant violated a court order regarding child support. However, there does not appear to be any Contempt proceeding ever instituted for nonpayment of child support, or any Contempt judgment entered.

2. The Board determined that Applicant failed to timely file federal income tax returns and timely pay taxes from 1987 - 1990. However, there does not appear to be any federal charges ever filed against the Applicant and the opinion fails to disclose whether the tax returns were on extension.

3. The Applicant failed to disclose an arrest for DUI on his law school application.

4. The Applicant allegedly falsely represented himself to be an attorney in a letter to a creditor. However, the Court's opinion fails to disclose the actual language used in the letter and the veracity of the Bar's finding on this issue is therefore questionable.

5. The Applicant bounced some checks, due to his financial difficulties. No charges ever filed.

The conclusion that must rationally be reached in the case of SC95308, is that unless the State Bar and Supreme Court disbar Florida attorneys and Judges when they fail to pay child support, bounce checks, or file income tax returns late, the Bar Applicant is held to a higher standard of conduct than the licensed Florida attorney or Judge. The Supreme Court's opinion in this case states:

> ". . . the citizens of Florida are entitled to more than excuses when we certify the character and fitness of our lawyers."

The Court lacks candor. They are not trying to protect the citizens of Florida. If they were, then all Florida attorneys and Judges would be held to the delineated character standards. What the Bar and Court are really trying to do is deny admission for the purpose of reducing the competition amongst lawyers, so that legal fees will be higher for the general public. Stated simply, the Court is attempting to do precisely the opposite of what it contends. The Court is harming the public, not protecting them. The Court's false characterizations and lack of candor reflects adversely upon the moral character of the Justices.

In SC95835, the Bar denied admission based on the following alleged conduct of the Applicant:

1. From 1978 - 1983, allegedly engaged in multiple acts of domestic violence in his first marriage, second marriage, third marriage, and fourth marriage. However, no convictions appear to have resulted, as no mention of a conviction is disclosed by the Court.

2. Represented himself in child custody litigation, and the judge in the case stated that his position was "absurd."

3. Allegedly failed to pay child support. However, no Contempt Judgment appears to have ever resulted, as no mention of such is disclosed by the Court.

4. In a 1996 lawsuit, Applicant failed to serve a copy of an Answer upon the plaintiff's attorney in violation of the rules of civil procedure.

5. Allegedly engaged in the unauthorized practice of law. No conviction.

6. Applicant allegedly misrepresented what had been told to him by the State Bar.

7. Applicant allegedly displayed malice and ill feeling toward members of State Bar staff.

The conclusion that must rationally be reached in the case of SC95835, is that unless the State Bar and Supreme Court start to disbar Florida attorneys and Judges when they fail to pay child support, are accused of domestic violence without any resulting conviction, or fail to comply with service of process rules in litigation, the Bar Applicant is held to a higher standard of conduct that the licensed Florida attorney or Judge. Concededly, based on the multiple allegations of domestic violence, the Applicant may have committed such on at least some of the occasions, but in the absence of a conviction, they are all nothing more than mere allegations.

The Bar and Court have relied totally on a process of accumulating numerous incidents, in the hope of reaching an unsupported conclusion that Zero plus Zero Equals One. Frankly speaking, I would be more inclined to support the Bar's decision to deny admission in this case, solely on the ground that by getting married four times, the Applicant was stupid. Since however, that's also not a valid ground, he should have been admitted.

In SC95855, the Bar and State Supreme Court must have tried to look like complete, irrational nitwits. They were dealing with an Applicant who had financial problems. Nothing more. They denied admission based on the following alleged conduct of the Applicant:

1. Failed to pay child support
2. Failed to maintain health insurance for his daughter
3. Failed to financially satisfy a default judgment
4. Bounced a check
5. Defaulted on student loan
6. Incurred unnecessary academic expenses
7. Was delinquent in paying his health club membership account
8. Did not maintain a checking account from 1995-1997
9. Incurred an extravagant expense by leasing a Mazda Miata for $ 340 per month

The conclusion that must rationally be reached in the case of SC95855, is that unless the State Bar and Supreme Court start to disbar Florida attorneys and Judges when they fail to pay their debts, the Bar Applicant is held to a higher standard of conduct that the licensed Florida attorney or Judge. Both the Bar and Court look particularly irrational by asserting the Applicant lacks moral character because he leased a Mazda Miata, and incurred academic expenses. The Supreme Court truly makes it difficult in this case, for citizens to have any degree of respect or confidence in the Florida State Supreme Court.[236]

Supreme Court of Florida, No.SC95639; Versuslaw 2000.FL.0044476 (2000)

The Bar denies admission in this case based on the following alleged conduct of the Applicant:

1. **Before entering law school**, Applicant stole compact disks from his employer and pled no contest to third degree grand theft.

2. Applicant's explanation of (1) above was false and misleading because he denied doing anything illegal. Applicant stated that his plea of no contest, was one of convenience.

As a preliminary matter, I would note that in this case, unlike the four absolutely ridiculous Florida cases discussed in the last section, there is at least a plausible ground for denying admission. The Applicant in this case, pled "No Contest" (which is the equivalent of a guilty plea), to third degree grand theft. His protestation of innocence carries minimal weight in light of his plea, however his assertion of innocence does not reflect adversely on his moral character, as the Florida Bar falsely contends. Rather instead, his assertion of innocence should simply have been disregarded.

The conviction of third degree grand theft should be assessed in light of the factor of rehabilitation and the amount of time lapsed since commission of the crime. The Applicant submitted evidence that he participated extensively in city and neighborhood volunteer activities, had a good reputation working with children, and a good reputation in law school. In addition, he worked for the Royal British Legion, a charity for members of the armed forces, and helped another attorney on a volunteer basis to perform legal work for the Haitian community. He also participated in several other charity and community events.

The Court denies admission (of course, in Florida they almost always do). I would admit the Applicant for the following reason. The opinion in this case was rendered in the year 2000, and his application for admission was filed in 1997. Consequently, the earliest he could have entered law school was in 1994. The Theft conviction therefore, had to have occurred prior to 1994, since the opinion indicates it occurred before he entered law school. Such being the case, at least six years have lapsed since the theft and it appears to be his only conviction. This fact, coupled with his efforts at rehabilitation, would lead me to grant admission without hesitation. [237]

Supreme Court of Florida, No.SC96664; Versuslaw 2000.FL.0048817 (2000)

NO QUALIFICATION TO JOIN THE BAR IS MORE IMPORTANT THAN TRUTH & CANDOR;

NO QUALIFICATION TO BE A STATE SUPREME COURT JUSTICE IS MORE IMPORTANT THAN SECRECY & A LACK OF CANDOR

The Applicant whose name is falsely presented as "John Doe" in the Court's opinion was denied admission. He was already a licensed attorney and member of the Bar of another state, but the Court "fails to disclose" the name of the State. He was denied admission to the Florida Bar for three reasons.

First, in 1990 (almost ten years prior to the Court's decision in this case) he answered "no" on a law school admission application to the question inquiring whether there were any criminal charges "pending . . . against you." In fact, a battery charge was pending against him at the time. It was subsequently Dismissed. He testified at the Board hearing that he honestly believed "his criminal case **had been** or was about to be, dismissed." Second, the Board alleged that he falsely denied every being "placed on scholastic . . . probation, . . . or advised to discontinue your studies." In 1990, while attending law school he was physically ill during his first semester and failed two courses. On the exact same date that he voluntarily withdrew from law school for medical reasons, the School's Academic Standing Committee sent him a letter advising him that he was academically excluded from further studies. He did not receive the school's letter until after he voluntarily withdrew. Thirdly, the Board alleged that he testified falsely at the Bar's investigative hearing that the law school only suggested that he withdraw, when in fact he had been academically excluded.

The Court irrationally rules in favor of the Bar and denies admission. The issue pertaining to the pending criminal charge should have been excluded from consideration for the following reasons. First, it was too remote in time having occurred almost ten years prior to the Court's opinion. Second, the charge was in fact ultimately dismissed. Third, the question was on a law school application and not a Bar admission application. Fourth, the question was unconstitutional since pending charges which are ultimately dismissed, are irrelevant to one's fitness to practice law. They are in fact, a worse reflection upon the agency that brought the charge, compared to the individual unfairly victimized by having to go through the time and trouble to obtain dismissal.

The issue pertaining to academic exclusion appears to indicate the playing of some "hanky-panky" by the law school. Since the school's letter was sent on the exact same day the Applicant voluntarily withdrew (and received by the Applicant later), it is highly likely the letter was sent in response to his withdrawal. The Bar and Court's characterization of the incident based on the manner in which it is presented in the opinion appears to lack candor. In sum, you have an Applicant who was already a licensed attorney in another state, with no criminal convictions, and the Bar's presentation of two minor incidents that were almost ten years old. The Board's conclusions suffer from numerous infirmities of rationality. The Applicant definitely should have been admitted. The Court's opinion indicates that the Bar stated it would recommend admission in two years without further proceedings if the Applicant satisfied three criteria, one of which was as follows:

"submit an essay to the Board on the importance of candor for lawyers."

That condition is crap. The Bar wants the essay for the purpose of establishing its' own egotistical dominance over the Applicant. They want to probe his beliefs in violation of the First Amendment, and leverage him into becoming one of their irrational "followers." Essentially, they are indicating that in order for him to be admitted, he will have to adopt a definition of so-called "candor," that is in accordance with their irrational notion of it. They want an essay demonstrating his remorse and loyalty, so they will be able to control him as an attorney. They want the essay, because they want

his "will and soul." This Applicant has no reason to show the Florida Bar remorse. A truthful essay on the importance of "candor" would necessarily entail delineating the Florida Bar and Supreme Court's lack of candor in their handling of this case, which would ultimately result in another denial of admission.

The Court lacked "candor" because they "failed to disclose" the name of the other jurisdiction where this Applicant was a licensed attorney. The Court lacked "candor" because they "failed to disclose" truthfully the name of the Applicant. The opinion states:

> "no qualification for membership . . .is more important than truthfulness and candor."

Yet, Footnote 1 of the Court's opinion states:

> > "John Doe is a fictitious name. We use it because we exercise our discretion to keep this file confidential as to the applicant involved."

An essay on the importance of candor? To the Florida Supreme Court it is obviously important for Bar Applicants to be subjected to an unreasonable and irrational standard of candor, while the Court itself has no obligation to be "candid" with the general public in its' opinions.[238]

Supreme Court of Florida, No.SC96374; Versuslaw 2000.FL.0048821 (2000)

The Applicant in this case was denied admission. In 1994, she unlawfully obtained a refund in the amount of $ 92.28 from a department store for a purse she had not purchased, unlawfully removed a $ 155.00 wallet from the store, and failed to timely file income tax returns in 1989, 1990 and 1991. She entered a deferred prosecution agreement with respect to the retail theft which ultimately resulted in the charges not being prosecuted. As a result, no conviction resulted. No prosecution was ever instituted with respect to the income tax return late filings.

She should have been admitted. The purpose of a "deferred prosecution agreement" is specifically to provide a criminal defendant with the opportunity to satisfy a certain set of criteria, in order to avoid the stigma and consequences of a criminal conviction. If the State wants a person to suffer from the consequences of a conviction, then it should not enter into such agreements, but instead should proceed with prosecution. The bottom line is that this Applicant was never convicted of a crime. It is disingenuous for the Bar and Court to attempt to stigmatize the Applicant with "guilt" pertaining to her conduct, while simultaneously proceeding to uphold the legitimacy of "deferred prosecution agreements." Such agreements are a deal; a contract so to speak. By falsely asserting that the Applicant is still responsible for the ramifications of an admitted criminal act, even when no conviction is obtained, the Bar and Court undermine the criminal justice system and the viability of deferred prosecution agreements. This reflects adversely upon the character of the Bar and Courts. A person is either convicted of a crime or they're not. If they're convicted, the Bar can consider the matter. If they're not, the matter is irrelevant. That is the standard our society has adopted to assess an individual. The opinion notably indicates that the Bar alleged as follows:

> "in a 1997 amendment to her Florida Bar application, <Applicant> **falsely stated that she left a department store without realizing** she was holding a wallet."

She disclosed the fact that she left without paying. The Bar's allegation contested her accompanying assertion that she failed to pay "without realizing" it. It is totally impossible for any person, to accurately discern whether one who commits an act "realized" they were doing so, or did so "without realizing" it. It is therefore the Bar's allegation which was "false," not her statement. Notably, the incidents in this case which are fairly minor in nature occurred almost seven years prior to the Court's opinion. They are therefore too remote in time anyway to function as a valid basis to deny admission. [239]

Supreme Court of Florida, No.SC95555; Versuslaw 2000.FL.0048819 (2000)

FIVE THOUSAND DOLLAR?? THEY'VE GONE BONKERS!!

This case involves an individual's application for readmission. He was previously disbarred in 1993, for what it appear to be valid reasons. In order to reapply for admission he was required under Florida Rule 2-27 to pay a $ 5000.00 application fee. That's crap. The imposition of such an irrationally, exorbitant fee simply to file an application can do nothing else than make the State Bar and State Supreme Court look like anticompetitive, economic protectionist, money-grubbing scum.

I recommend that the members of the Florida State Bar Committee and Justices of the Florida Supreme Court be suspended from the practice of law until such time as they submit an essay on the importance of the Judiciary to be fair, just, constitutional and compassionate. (See Florida SC96664 above on essay requirement for Applicant).[240]

GEORGIA

247 S.E. 2d 64 (1978)

ONE PERSON'S WORD AGAINST ANOTHER.
BUT THE ATTORNEY'S WORD IS WORTH MORE

The Applicant was certified to take the February, 1977 exam. While awaiting the results, an incident that occurred in September, 1976 was reported to the Board of Bar Examiners. A Georgia attorney had taken the Applicant's deposition in connection with a case for a client he represented, that was accused of shoplifting. The accused shoplifter was not the Applicant. The Applicant had worked as a security guard at the store where the alleged shoplifting occurred.

About a month after the deposition, the Applicant called the attorney and came to his office on two occasions. It is at this point, testimony of the Applicant and the attorney differ. The attorney testified that the Applicant offered to give testimony favorable to his client for the sum of $ 1500. The Applicant testified that he only offered to do investigative work. He said the attorney indicated he would pay $ 200 for investigative work related to the shoplifting case. The Applicant further testified that he did not intend to convey the impression he would be willing to give false testimony.

Based on this incident, the Applicant was denied certification on character grounds. The State Supreme Court gave no explanation for accepting the attorney's version of the story and simply concluded there was "ample" evidence to authorize denial of certification.

The Applicant should have been certified. What you have here is a situation where a member of the State Bar got mad at an Applicant for some reason related to a case they were both involved in. They each presented different versions of what occurred. A straightforward situation of "he said and he said." One person's word against the other.

In the absence of substantial corroborating evidence, the matter should not preclude certification. There was no valid reason to accept the attorney's word over the Applicant. The Court dropped the ball and the weakness of their position is exemplified by the fact they failed to disclose supporting analysis or justification in their opinion. [241]

252 S.E. 2d 615 (1979)

WE DON'T JUST WANT THE WHOLE TRUTH. WE WANT MORE.
WE WANT YOU TO ANSWER THAT WHICH WE DON'T EVEN ASK.

The Applicant disclosed a misdemeanor conviction for marijuana. The Board found that in doing so he lacked honesty, because he failed to disclose that it became a misdemeanor only after being reduced from a felony. Issues pertaining to his candor were also raised by the manner in which he made disclosure regarding charges and convictions for drunk driving, and whether his responses were designed to conceal the status of his child support payments. The Applicant contended that any errors were inadvertent. A Hearing was held and counsel appeared on his behalf. The Board found that because of the nature and number of errors and omissions, the contention of inadvertence should be rejected. The Court rules in favor of the Board.

I would admit the applicant. The Board is penalizing the Applicant because it doesn't like the form in which he disclosed matters. By adopting such a stance, the Board penalizes what is essentially known as good "lawyering." Typically, the best lawyers will assert that when asked a question, one should respond with the minimum amount of information that satisfies the question's inquiry. The Applicant did no more than engage in "traditional trial tactics" which have been given the express approval of numerous Federal Appellate Courts within the context of litigation. He answered the questions. The fact he omitted to disclose that the misdemeanor was actually a "felony conviction later reduced to a misdemeanor" is irrelevant. The fact is that it was reduced. Therefore, it was a misdemeanor. Simple as that. For the Board to expect more is irrational on their part, and would be "bad lawyering" by the Applicant. I would be more concerned about the quality of representation an attorney will provide to clients, if they disclose more than the limited scope of a direct inquiry on a Bar application.[242]

The Board was in the woods on this case. I guess it would be the "Georgia woods."

282 S.E. 2d 298 (1981)

INNERMOST FEELINGS AND PERSONAL VIEWS?

The Applicant was never convicted of a crime based on the facts set forth in the Court's opinion. He is denied certification on the ground he engaged in questionable business practices while acting as president of a mortgage company that filed for bankruptcy. Those practices consisted primarily of trying to expand the company, when he lacked sufficient information. The Court rules in favor of the Board. In its' opinion the Court makes the following statement which demonstrates the unfettered discretion and subjective nature of the Board's inquiry process:

> **"In his final enumeration, applicant asserts that he was denied due process because "the Board is not bound to strictly observe the rules of evidence but consider all evidence deemed creditable in an effort to discover the truth without undue embarrassment to the applicant." . . . We cannot agree.** Bar admissions hearings are not criminal proceedings. . . . "A hearing to determine character and fitness should be more of a mutual inquiry for the purpose of acquainting the court with the **applicant's innermost feeling and personal views on those aspects of morality,** attention to duty, forthrightness and self-restraint which are usually associated with the accepted definition of "good moral character." [243]

When I read the phrase, "for the purpose of acquainting the court with the **applicant's innermost feelings and personal views,"** I am almost unable to continue writing. It's absolutely unbelievable! What business is it of theirs? For those members of State Bar admissions committees reading this book, you want to know my "innermost feelings?" You want my "personal views?" They're in this book. And I'm betting that when you're through reading, you'll wish I hadn't expressed them.

481 S.E.2d 511 (1997)

The Board denied certification on moral character grounds. They determined the Applicant was not fiscally responsible. She graduated from George Washington School of Law in 1992. When she filed her application she disclosed defaulted student loans. The Board informed her of its policy not to grant certification until she demonstrated that she had contacted creditors and made arrangements to pay existing debts. Instead, she filed for bankruptcy. The bankruptcy court denied discharge of two of the student loans. She then reached settlement agreements with certain loan creditors in 1995. She succeeded in discharging other student loans and $ 17,000 in consumer debt.

She failed to disclose addresses for her three most recent employers and account numbers for four creditors. This was determined by the Board to demonstrate a lack of candor. The Court affirms the Board's decision based on the conclusion that she did not show good faith to meet her obligations.

I would admit the Applicant without hesitation. There is no law requiring one to pay their debts. Creditors can sue debtors. That is the proper recourse. None other. This Applicant has done absolutely nothing illegal or immoral. She couldn't pay her bills. Many people are in the same situation. The Court's conclusion smacks of hypocrisy for one crystal clear reason. Licensed attorneys and Judges are not required to demonstrate on a regular basis that they are meeting their financial obligations.

The result of this Court's irrational reasoning is that you must pay your bills before gaining admission, and then once you've been admitted you have the freedom to stop paying your bills. It is a clear violation of the Equal Protection Clause. It provides a favored status to licensed attorneys in comparison with Bar Applicants regarding payment of debts, and does so without any rational basis. The Dissent submits the following perspective on the issues:

> ". . . By means of a letter from the Director of the Office of Bar Admissions, the Board informed . . . that "an applicant's lack of fiscal responsibility alone is sufficient cause to deny certification"
>
> **. . .**
>
> . . . I believe the Board, when it bases a denial of certification on a ground not raised in the specifications, and **This Court when it affirms such a denial, acts in a procedurally defective manner.**
>
> . . . In essence, the Board determined that . . . incurring debt for a legitimate purpose, her filing of a petition for bankruptcy and having four student loans discharged therein, . . . was tantamount to a "lack of fiscal responsibility" which reflected a lack of the character and integrity expected. . . .
>
> **. . .**
>
> **There is no suggestion in the Rules of the State Bar of Georgia, the rules of any court, or any other relevant source that it is an expectation of members of the Bar, either as an expectation subject to disciplinary sanction or even a simple statement of the expectation as an aspirational goal, that a lawyer will not aggregate debt beyond the lawyer's ability to pay or that the lawyer has any obligation to pay the lawyer's debts,** other than debts arising out of the handling of client funds; or that the lawyer may not take advantage of bankruptcy remedies to discharge those debts. . . ."

In reference to the Finding that the **failure to disclose addresses of three employers and account numbers for some credit cards** demonstrates a lack of candor**,** Footnote 8 to the opinion states as follows:

> "There is no evidence that the listing provided by the Applicant in her original application and amendments was materially incorrect. . . . **There is no evidence that the Applicant had any more complete information than was provided. . . . The Office of Bar Admissions was unable by its direct inquiries to obtain any information greater than was provided by Applicant**. . . . The evidence does not reflect a lack of candor. . . . There is not the slightest suggestion of any additional adverse information which Applicant was attempting to conceal."[244]

I would immediately Admit the Applicant to the Bar, and give serious consideration to Suspending the Board members for misrepresenting the nature of her minor, innocent and immaterial omissions which reflects negatively on their character. I would then grant the Board members permission to apply for reinstatement in two years upon demonstrating an appropriate degree of rehabilitation and remorse. Principally, I would want to ensure that the Board would no longer engage in making false accusations with an intent to deceive.

Supreme Court of Georgia, Case No. S98A0627; Versuslaw 1998.GA.209 (1998)

The Applicant was never convicted of any crime based on facts set forth in the Court's opinion. The Board denied certification based on an unprosecuted 1990 incident in which the Applicant allegedly entered unlocked cars with the intent to steal, and an alleged plagiarism incident in which he was determined to be innocent by his law school. The initial hearing officer recommended certification, but the Board rejected that officer's findings. The Board concluded that the Applicant's assertion of innocence with respect to plagiary demonstrated a lack of understanding of the meaning and consequences of his actions. This is notwithstanding the fact that he was exonerated by his law school. The Court rules in favor of the Board and denies admission. The irrational opinion states:

> "Likewise, plagiarism is a serious matter which, if proved would authorize a denial . . . . In that regard, the evidence did not demand a finding that . . .<Applicant> . . . committed plagiarism. **Indeed, he was exonerated of that charge by the law school. However, the Board was not bound by the law school's determination, and the only issue for resolution is whether there is any evidence to support the Board's contrary determination . . . . The record shows the existence of such evidence. . . ."** [245]

Viewing the Court's opinion in the light most favorable to the Court, it must rationally be categorized as "CRAP." The Applicant positively should have been admitted. He was never been convicted of a crime and was exonerated from the plagiary incident by his law school. There was not a shred of legitimacy in the Board and Court's conclusion. In my view it takes a colossal degree of hypocritical gall for the State Bars on one hand to contend that an Applicant found guilty of an offense is lying when they continue to profess innocence; while on the other hand they contend an Applicant found innocent of an offense may still be found guilty by the Bar Committee.

1999.GA.0043307 (VERSUSLAW)
S99A1828 (1999)

THE AGE OLD STAR CHAMBER TACTIC. OBTAIN A CONFESSION REGARDING A MATTER THAT FOSTERS STATE BAR ECONOMIC INTERESTS, AND THEN USE IT TO SHOW NO MERCY WHATSOEVER, BUT INSTEAD TO DEMOLISH THE ACCUSED.

This case sadly demonstrates the contemporary degenerated state of the Bar admissions process, well over sixty years since the NCBE's magazine, the "Bar Examiner" published articles promoting the notion of State Bar "group thought" to enhance the power and economic interests of the legal profession.

The Applicant was granted certification in 1993. That certification was suspended in 1996 after the Board received a letter of complaint from an Administrative Law Judge (ALJ) about the Applicant. The letter pertained to his allegedly unprofessional conduct during the course of representing himself Pro Se in a worker's compensation case. A formal hearing was held at which it was determined his conduct in the case was:

2. "inappropriate, threatening and an abuse of the legal process"
3. showed "a total lack of judgment and common courtesy."
4. "frivolous, unwarranted, lacked justification and lacked integrity"

The opinion provides virtually no information addressing what the Applicant specifically did that "lacked integrity," "common courtesy," "justification" etc.. Notably, the Court's opinion does nothing more than provide unsubstantiated inflammatory and irrational conclusions, as no facts are given to support them. Perhaps no material facts existed to support them. Perhaps facts did exist. If so, the Court was "evasive" in "failing to disclose" such facts.

The Applicant was apparently fearful of not being admitted and ultimately wrote letters of apology to the ALJ and opposing counsel. The events remind me of how plea bargaining often works. Extract a confession from an innocent man under threat of a stiffer penalty in the absence of a guilty plea. Then utilize the technique of parsing words, to construe the plea bargain in a manner different than understood by the Defendant, so that the stiffer penalty is imposed anyway. In this case, the Court denied admission even after the Applicant apologized. The bottom line is that they didn't want this guy in the Bar because they felt he was a "rabble-rouser." He probably was. Often, they make the best attorneys.

And that's the last thing the Bar needs. An attorney who actually represents his clients zealously, instead of conducting himself in accordance with the requisite courtesies (sell-outs), appropriate behavior (kissing a corrupt judge's ass), and integrity (allowing opposing counsel to get away with a lie). **The best part of the opinion is Footnote 2 which reads as follows (BOLDING by author)**:

> "It is noteworthy that had <Applicant> been a member of the State Bar when he engaged in the conduct at issue, his conduct **could** have subjected him to discipline." [246]

It's a critically important footnote. This Applicant was denied admission to the Bar on character grounds. If he had been attorney though, the Court notes that his conduct **"could"** have subjected him to discipline. Notably, the word used is **"could,"** and not **"would."** The Court is stating that there is only a **possibility** that a licensed attorney would be disciplined for the conduct, although it is a **certainty** that admission is denied for such. Of equal importance, is the fact that if the conduct were committed by a

licensed attorney, the Court gives absolutely no suggestion that it either **would** or **could** result in disbarment. Essentially, disbarment appears out of the question for such conduct by a licensed attorney, but admission denial is a certainty for a Bar Applicant.

In light of the foregoing, are licensed attorneys in Georgia held to a lower standard of ethical conduct during the course of litigation, than a Nonattorney, Pro Se litigant? You betcha!! And that's exactly how they want it.

1999.GA.0043580 (VERSUSLAW); BAR ADMISS. DOCKET NO. 193 (11/1/99)

"MAYBE THE GEORGIA BAR, SHOULD DISCIPLINE THE FLORIDA BAR"

The Applicant was a member of the Florida Bar and applied for admission to the Georgia Bar. During the process the Florida Bar falsely represented to the Georgia Bar that he was a member in "good standing." The Florida Bar also falsely represented that an injunction entered against the Applicant did not constitute attorney discipline. In reliance on the multiple false representations of the Florida Bar, the Georgia Bar issued a temporary certificate of fitness entitling the Applicant to sit for the Georgia Bar exam.

They also requested the Florida Bar to "clarify" his disciplinary history. The Florida Bar wrote back that their previous letter was in error and should be disregarded. They represented that the injunction entered against the Applicant (prohibiting him from soliciting individuals associated with the Valujet air disaster), constituted attorney discipline. Based upon this new information in which the Florida Bar retracted their prior false statements, the Georgia Bar revoked the certificate of fitness and determined that the Applicant could not sit for the Georgia exam. On appeal, the Applicant contended the Florida Bar was mistaken in ultimately concluding the injunction constituted attorney discipline. The Georgia State Supreme Court concluded as follows:

> "However, **we believe that Florida Bar officials are in the best position to construe the rules** . . . and we will not interfere with the Florida officials' construction of their own rules in this matter."

My conclusion is that since the Florida Bar initially provided false representations to the Georgia Bar regarding the injunction, they were far from being "in the best position to construe" the rules. It is clear they had substantial uncertainty regarding whether the injunction was a form of attorney discipline. It was unfair to penalize the Applicant for the Florida Bar's lack of candor and dissemination of false information. Footnote 1 of the Georgia Supreme Court's opinion states:

> "Regarding the other two inquiries against <Applicant>, . . . **the other had no disposition entered**, but nonetheless appears to have resulted in a disciplinary sanction being imposed by Florida Bar regulators."

Two points are relevant regarding the footnote. First, if the other inquiry resulted in a sanction, the Florida Bar's failure to enter a disposition, constituted an evasion of disclosure of the matter's determination. Second, the Georgia Court's conclusion that it resulted in a sanction, notwithstanding that no disposition was entered, undermines their earlier assertion that they would not interfere with conclusions of Florida officials. If the Florida Bar did not enter a disposition, deference would mandate a conclusion that no disposition was made.

The Georgia Court thus lacked candor by previously asserting they would rely on Florida officials, because in fact, Georgia concluded on its' own that a sanction appeared to have been imposed.[247]

IDAHO

780 P.2d 112 (1989)

THE ABILITY TO PRACTICE LAW IS A PRIVILEGE, NOT A "NATURAL RIGHT" OR "CONSTITUTIONAL RIGHT." IT'S A RIGHT, BUT A RIGHT THAT'S REALLY A PRIVILEGE. IT KIND OF LOOKS LIKE A RIGHT AND SEEMS LIKE A RIGHT, BUT IT'S NOT A REAL RIGHT. THE U.S. SUPREME COURT DIDN'T MEAN IT WAS A REAL RIGHT IN SCHWARE, JUST KIND OF LIKE ONE OF THOSE MAKE-BELIEVE RIGHTS THAT ARE REALLY PRIVILEGES AND NOT RIGHTS. RIGHT???

The Applicant, a 42 year old member of the Washington State Bar had previously applied for admission to the Idaho Bar in 1986 and was refused permission to sit for the bar exam on character grounds. He then applied again in 1987 and was denied permission. After a Hearing, the Commission denied the application without delineating specific findings of fact. Instead, they vaguely stated:

> ". . . exhibited conduct substantially evidencing **an inclination** to violate reasonable rules of conduct and to fail to exercise substantial self-control . . ."

The Idaho Supreme Court first holds that the practice of law is a Privilege and not a Right. It states:

> "Recognizing that the practice of the legal profession is a privilege granted by the state and not a natural right of the individual, it is deemed necessary as a matter of **business policy** and in the interests of the public to provide laws and provisions covering the granting of that privilege . . .
>
> Quite recently, the Supreme Court of Iowa articulated the same principle as follows : "**The right to practice law is not a natural or constitutional right, but is in the nature of a privilege** or franchise." . . .
>
> **However, the right to practice law is not a matter of grace.** We cannot exclude a person from the practice of law for reasons that contravene the due process or equal protection clauses of the United States Constitution. Schware v. Board of Bar Examiners, 353 U.S. 232 . . . (1957). . . ."

Two aspects of the foregoing, strike me as lacking in logic. First, the Court holds that the ability to practice law is a Privilege and not a "natural right" or a "constitutional right," yet they contradict themselves by referring to it as a Right when they cite *Schware* for the premise:

> "However, the right to practice law is not a matter of grace. . . ."

The Court's reasoning requires one to inescapably reach the conclusion that when the U.S. Supreme Court referred to the ability to practice law as a "Right," it did not mean it was a constitutional right. The U.S. Supreme Court's opinion in Schware however, was predicated on *Ex Parte Garland*, supra , which irrefutably concluded otherwise. The Idaho Court's reasoning is thus illogical.

Secondly, it is incredible that to justify their irrational position that the ability to practice law is a Privilege, the Idaho Court relies first on "business policy" and only secondly the "interests of the public." They expose their hand. They have tacitly confessed that admission requirements are a

matter of protecting the economic interests of lawyers first, and the interests of the public, second. This diminishes the legitimacy of their opinion.

The Applicant contended that the Commission's failure to formulate Findings of Fact violated Idaho law and renders their decision inherently arbitrary and capricious because it prevents him from rebutting specific allegations. He contends that Bar Applicants must be given reasonable opportunity to defend themselves against charges. By failing to state findings, the Commission violates the most basic predicate of due process incorporated in the 14th amendment. The requirement of notice. On the Findings of Fact issue, the Court agrees with the Applicant. It states:

> "We agree that the Commissioner's failure to issue findings of fact and conclusions of law was in error. . . . the United States Supreme Court has held that "the requirements of procedural due process must be met before a State can exclude a person from practicing law." **Willner v. Committee on Character and Fitness**, supra (1963). . . .
> . . .
> **This Court has held that findings of fact are necessary to fulfill the requirements of due process of law** . . .
> **. . .**
> Here, the failure of the Commission to make findings of fact deprived <Applicant>. . . of his right to due process of law. His interest in practicing law in Idaho is a substantial interest. . . .
>
> The attempt by the Commission to state findings of fact in its brief did not fulfill this requirement. . . .
> . . .
> The current administration of moral character criteria is, in effect a form of **Kadi justice** with a procedural overlay. . . (defining Kadi justice as informal judgments rendered according to individual decisionmaker's ethic or practical valuations).) **Politically nonaccountable decisionmakers render intuitive judgments, largely unconstrained by formal standards** and uninformed by a vast array of research that controverts the premises on which such adjudication proceeds. **This process is a costly as well as empirically dubious means of securing public protection.** Substantial resources consumed in vacuous formalities for routine applications, and non-routine cases yield intrusive, inconsistent and idiosyncratic decision-making. . . . **Only a minimal number of applicants are permanently excluded from practice, and the rationale for many of those exclusions is highly questionable. . . ."** [248]

The Court then remands the case back to the Commission with instructions that they make Findings of Fact, stating particularly what acts or omissions of the Applicant make him unfit. The Court does make some excellent and very correct statements. It elegantly describes the key problems with the bar admission process in general. It then drops the ball by remanding back to the Commission. The Court should have forthrightly ordered admission. Assuming the Court's statements about the manner in which the Commission conducted itself are correct, and I believe they are, then the Commission has essentially lost its credibility.

Nevertheless, the Court sends the case right back to the Board that is guilty of violating the Applicant's constitutional rights. That Board having been made to look blatantly foolish to the State Supreme Court now has an incentive to get even. To properly neutralize the Commission's "Kadi" tendencies, the matter should have been taken wholly out of their hands and conclusively decided. By doing otherwise, the Court displayed a marked lack of fortitude and decisiveness.

One other point needs to be made. The Commission as stated previously, violated the Applicant's due process constitutional rights by failing to issue Findings of Fact. This point can mean

only one of two things. Either the Commission did so intentionally, or alternatively they were not aware of their legal obligations under the law to state Findings of Fact. The former reason manifests an intent on their part to violate the law.

The latter reason demonstrates a general incompetence on their part with respect to the admissions process. *Willner* and *Schware* were landmark U.S. Supreme Court cases. The Commission should be expected to be aware of them. Previous case holdings in Idaho had stressed the importance of Findings of Fact in licensing cases. To remand the case back to a Commission that was either intentionally violating the law, or was simply too incompetent to administer it, made no sense.

ILLINOIS

488 N.E. 2d 947 (1986)

WE'RE REALLY NOT MUCH MORE THAN BALL-BUSTERS HERE AT THE ILLINOIS BAR

The Applicant was denied admission on the ground that his application contained inaccurate information regarding his high school education and omitted some of his residences. In addition, he had 200 to 400 parking tickets which he disclosed. The Committee also found that on two occasions he had falsely represented himself to others as a police officer. Purportedly, he did so while in a tavern with friends, and once in 1977 when he asked a college classmate who was a police officer, if he could borrow his badge and gun to arrest some persons he saw smoking marijuana. Whether these incidents were done in jest is not clear from the Court's opinion.

The Applicant discounted the significance of the parking tickets and asserted that many were unfairly given, such as when he put money in the meter and received a ticket anyway. He also pointed out that parking meter revenue was an important source of revenue for the city.

He listed dates of attendance for a high school from 1970-1974, although the actual years were 1971-1975. This he attributed simply to making a mistake in filling out the forms. In reference to the residence issue, he indicated that he had resided at his parents' home for the last 10 years, when in actuality he lived at five different addresses in Chicago. He occupied those places for only short periods, ranging from one day to eight months and generally was not required to pay rent. He explained this by asserting that the application called for a list of domiciles which remained his parent's residence at all times.

The Court denies admission. Attempting to artificially inflate the importance of all the piddly allegations, the Court states:

> "Remarkably, on his application he provided incorrect information regarding his high school attendance, and he failed to list his numerous residence. . . ." [249]

There were no valid grounds of any nature to deny this Applicant admission. He made two minor and immaterial clerical mistakes on his application. Those errors are more attributable to the Bar unconstitutionally requiring an Applicant to provide information going back well over a decade, than to any issues pertaining to his candor. The incident regarding impersonating a police officer may well have just been a matter of joking around with friends. It doesn't seem to have ever amounted to anything more than an off-the-cuff statement, perhaps made with a smile, to close acquaintances.

Regarding the parking tickets, you could not possibly get more piddly. The Applicant disclosed them and apparently paid them. They don't reflect on character at all. They are a chief source of revenue for municipalities and the average citizen including myself, adopts the standpoint, that if you get a ticket you pay it, and that's it. Both the Bar and Illinois Supreme Court simply look like ball-busting-twits out to bust the chops of an Applicant.

Now you want to talk about lack of character and fitness in the Illinois Judiciary? Well, then you should really talk about what was known as "Operation Greylord" (a Justice Department investigation of corruption in the Illinois judiciary) in the late 1980s, or what the ABA which is based in Illinois, has done to this nation.

518 N.E. 2d 981 (1987)

BEING GENERALLY INCOMPETENT, WE AT THE ILLINOIS SUPREME COURT TRY HARDER TO LOOK LIKE IDIOTS

This case is an Illinois "beauty." The Applicant born in 1947 filed his application in 1984. While a student in high school he was suspended approximately 23 times. On his first job, he was discharged for stealing money from vending machines. He was charged with robbery, but as an alternative to conviction, was given an opportunity to enter the military service. He enlisted in the Marine Corps. While in the marines, he was absent without leave for 71 days and given an undesirable discharge. His record included convictions for disorderly conduct, selling marijuana, possession of heroin and cocaine. On his law school application he failed to reveal convictions for disorderly conduct and theft. His last arrest occurred more than 11 years prior to the Court's decision on his application.

During his law school years he was an excellent student. He worked with a U.S. District Judge in an extern program and the Judge testified that he believed the Applicant was an individual of great integrity. The Judge further testified that he knew of the Applicant's experience with drugs, alcohol, his arrests and undesirable discharge and still believed him to be of good character. Two law school professors testified that the Applicant was completely rehabilitated and recommended admission.

My reasons for presenting this case are not for consideration of the character issues involved, but instead for demonstrating the games that are played by Courts and Bars during the admissions process. Because what happened in this case is absolutely incredible. It is incredible whether or not one believes this Applicant should be admitted, and reflects on the Illinois Supreme Court in a most pathetic manner. First, I think we can all agree that for the Bar to certify this Applicant who has a lengthy criminal record, while denying certification to the Applicant in the last case discussed (488 N.E.2d 947 1986) is inconsistent. That however, is also not the point of presenting this case.

The key issue in this case focuses on Illinois Supreme Court rule 708(c). Under that rule as it existed at the time, once the Applicant was certified by the Committee, he was expressly "entitled to admission." The rule contained no provision for review of a decision favorable to the Applicant. Who could or would appeal it? Certainly, not the Committee that certified the application and certainly not the Applicant who was "entitled to admission."

The Applicant in this case was remarkably certified by the Committee. The Court then decided "sua sponte" (on its' own) that it didn't like the Committee's decision. It granted the Applicant leave to file a petition addressing the question of character, and directed the Administrator of the Attorney Disciplinary Commission to file a response. Stated simply, the Illinois Supreme Court blatantly violated its' own rule, thereby creating its' own litigation. The Applicant naturally contended that the court's rule expressly stated that the matter was to be determined by the Committee and that there was no provision in the rule for review of a favorable decision. The Court, apparently intent on diminishing any semblance of respect that should be accorded to its own rules, decided to violate the rule in an express manner and denied admission. The opinion states:

> **"Petitioner argues, with justification, that a denial of admission without further procedures following certification would constitute a denial of due process.** It should be noted that here, the court, sua sponte, provided an opportunity for petitioner to appear and persuade the court that the record before the committee did, indeed, support the conclusion that he had been fully rehabilitated and was fit to be admitted to the practice of law.
>
> . . .
>
> **We consider next petitioner's contention that under Supreme Court Rule 708(c), having been certified by the committee, he is entitled to admission to the bar.** A rule, like a statute,

must be construed to avoid an absurd or unconstitutional result. Were we to construe Rule 708(c) in the manner urged by petitioner we would face the absurd situation that, confronted with the record here, we were powerless to consider the correctness of the decision to certify and would be required to blindly admit petitioner. . . . **To read literally the language of the rule would divest this court of jurisdiction to review the finding of the committee and thereafter deny admission** . . . ."

The Court then goes on to deny admission on character grounds. What happened in this case is quite clear. The Court didn't know how to draft its' rules properly. They did an incompetent job writing the rule, discovered that it had an absurd result, and so violated the "literal language" of the rule. They opined that it was not proper:

"To read literally the language of the rule . . ."

I do not contend that this Applicant's character warrants certification. Nevertheless, if the rule mandates admission, then as a matter of law there really is no choice. What if citizens conducted themselves similarly with respect to laws? If the Court can expressly break its own rules, can I as a citizen break laws? Why can't citizens violate dumb and stupid court orders, if the Illinois Supreme Court can expressly violate its' own admittedly "absurd" court rule? This opinion is a prime example of the Court holding itself above the law. It's particularly incredible because it holds itself above the law, as unilaterally promulgated by the Court itself. The Dissent nails the issue perfectly. Before addressing the Dissent however, its' importance is best laid out by a specially concurring opinion that states:

"The author of the dissenting opinion has, inadvertently I hope, used innuendos, general accusations, and emotionally charged language, which were seized upon by segments of the media, expanded and used to create a cause celebre over a "reformed drug addict and petty thief" whom this court has refused to license to practice law. **I feel I must respond to the misleading and unfortunate statements by the author of the dissent, which have caused the media and the public to challenge the integrity of those who joined in the majority opinion."**

The Dissent's statements are wholly fortunate, rather than misfortunate, and not at all misleading as they succinctly and correctly point out the reasons why the majority's integrity is in truth highly questionable. The Dissent quoted at length, states:

"This is the first time this court has deviated from its own rules and case law by reviewing, sua sponte, a bar application . . . the Committee on Character and Fitness has certified as fit to practice law. **In so doing, the majority ignores this court's prior decisions which limit review of the committee's findings.** . . . **In addition, the majority disregards the clear directive of Supreme Court Rule 708(c), which it shrugs off as "unfortunate language"**. . . . Rule 708(c) has been amended effective August 1, 1987, but no one suggests the amendment applies. . . . **By its opinion the majority has significantly changed the admissions process without first notifying applicant . . . law students, the bar, and the public.**
The majority justifies its decision to review . . . with the conclusory statement that to do otherwise would be both absurd and unconstitutional. . . . **It would be unconstitutional, according to the court, "to read literally the language of the rule" . . . .**

. . . Of course, the court has the authority to alter or repeal its rules, but it did not bother to do so here until first departing from the existing rule. **Due process demands that we follow our own rules while they remain in force, and they are binding on this court the same as a on litigants. . . . United States v. Nixon** (1974), 418 U.S. 683 . . . .

Without explanation and on its own motion, the court issued an order on June 4, 1986, after the committee had already certified . . . . **The order, which also set a date for oral argument, was seriously deficient for several reasons.**

It failed to advise . . . how this matter even came before us. **Nothing in the record indicates the source of the information which triggered this extraordinary proceeding.** Such review has not taken place--in even a single instance--since I have been a member of this court. Moreover, as the majority concedes, there are no formal procedures for keeping the court apprised of an applicant's interaction with the Committee on Character and Fitness. . . . **The only way this court could have been advised . . . therefore, was through an informal communication. The possibility that this unusual proceeding was initiated on the basis of rumors and gossip turns the entire admission process into a sham. . . .**

. . .

. . . **<Applicant> will not be permitted to practice law in this State, not because he has failed to follow the rules, but because we have.** The court's departure from any concept of fairness or regularity has been complete, and I would say, **almost Kafkaesque.** . . . The court has misused its authority, and I dissent. [250]

Bravo to the Dissent in this case. As for the majority, one can not help wonder if they decide other types of cases in Illinois in such an unlawful manner.

561 N.E. 2d 614 (1990)

WE AT THE LAW SCHOOL FIRST GIVE YOU A "PRELIMINARY" APPLICATION. THEN ONCE WE GET TUITION MONEY, WE GIVE YOU THE REAL APPLICATION

The Applicant, born in 1956, misrepresented his age in 1970, to enlist in the Army. He was about 14 years old. After his mother learned that he was in the service, she was able to secure his release and he was honorably discharged in 1971. For the next two years, he lived on his own without parental supervision. As a minor he was charged in about a dozen different delinquency proceedings, all of which were stricken or dismissed. Then, in 1973, at age 16, he pled guilty to rape and robbery. He was sentenced to four to six years of imprisonment, and released in 1977. In 1980, he again enlisted in the army. He received two punishments. First, when he disobeyed an order directing him to send an allotment of money to his wife and the second when he left his post without permission. Subsequently, he was the subject of a summary court martial proceeding for stealing the wallet of another soldier and served 30 days confinement. He was discharged in 1982 under less than honorable circumstances. In 1983, he enrolled at Chicago State University and completed work for a Bachelor of Arts in May, 1985. That same year, he was invited to enroll at the Southern University Law Center in Louisiana. He graduated from law school in 1989. On his law school application, he answered a question inquiring whether he had ever been charged with a criminal offense by checking both the "yes" and the "no" box, and then notating "See Il.R.S. chap. 38 12-13". The statute he cited was criminal sexual assault.

Before the Hearing panel, he testified that he initially marked the "no" box, and then immediately decided to correct it and wrote in the statutory citation for the offense of rape. He explained that he made the correction with a different ink color because he wanted to highlight the matter. Several months after submitting his preliminary application for admission to law school, the Applicant completed a more extensive application form, in which he failed to disclose his convictions and court martial. The Applicant testified that he did so because he feared he would be dismissed from law school if he responded truthfully. On his Bar application, he disclosed his criminal history in a comprehensive manner. He also presented testimony and affidavits from about 20 people in support of his admission. All were aware of his criminal record.

The circuit judge who sentenced him for rape characterized his academic achievements since prison as unique. The public defender who represented him, a woman who had since become an associate judge, supported his application. Since being discharged from the service in 1982, he had also participated as a volunteer to a number of charitable causes. The Bar committee noted that he expressed remorse for the offenses in 1973, but had particular concern with his failure to reveal the criminal record on his law school application. The Court stated:

> ". . . petitioner contends, as a preliminary matter, that the findings and recommendation of the committee's hearing panel should not be accorded their customary deference . . . because not all the members of the panel were present throughout the proceedings. . . . In support of this contention, petitioner notes that **only one member of the seven-member panel was present throughout the entire course of the two-day hearing;** of the six other members, five were absent during portions of the hearing, and one was not able to attend at all. . . ."
>
> . . . **the panel members' absences may indeed serve to lessen the deference appropriately paid to the members' resolution of factual issues. . . ."**

Based on the foregoing, the Court adopts a more comprehensive consideration of the application. In reference to the character issues, the opinion states:

"As a minor, petitioner was the subject of repeated delinquency actions, most of which were ultimately dismissed or stricken. **Petitioner insisted, as an explanation for many of those matters, that he and his friends were routinely charged by police with a variety of meritless offenses. . . .** As we have stated, the committee characterized petitioner's attitude toward his criminal history as "cavalier."

The Court apparently is unimpressed with the fact that the Applicant disclosed his criminal history on the Bar application. It states:

"Petitioner emphasizes that he was candid on his application for admission to the bar. . . . It may be noted that counsel for the committee has made no challenge to the accuracy or completeness of the information submitted in this regard by petitioner.

. . . in providing truthful and accurate answers to the questions on the bar application, petitioner simply did what was expected of him, and in that way avoided the potentially serious consequences of later disclosure and discipline. His candor in revealing his criminal record on the bar application cannot be said to constitute strong evidence of rehabilitation."

The Court denies admission stating:

"Certification of petitioner would, we believe, deprecate the seriousness of past offenses and tend to undermine the integrity of the profession he wishes to practice.

In the alternative, petitioner contends that several aspects of the procedures followed in the present matter by the hearing panel and by the full committee failed to comport with the requirements of due process . . .

With respect to the actions of the hearing panel, **petitioner complains that those who took part in the decision did not attend all the sessions. . . .**

With respect to the action of the full committee, petitioner first complains that he was never advised of the votes cast by the individual members of the full committee, and that he was not told what materials concerning the case were provided to the members prior to their decision. Again, we do not consider that public disclosure of those votes is necessary. In addition, we note from the record that the parties' briefs and the transcript of the hearing were made available to the committee members.

Petitioner also notes that less than a quorum of the full committee voted on the hearing panel's recommendation. . . . 10 of the 26 persons who serve on the committee were present when the hearing panel recommendation was adopted in this case**. At oral argument, counsel for the committee acknowledged that the committee has not specified what quorum is necessary for the committee to act.** Petitioner observes that under the rule at common law, a simple majority of the members of a body constitute a quorum, in the absence of a contrary provision. . . .

If there was a defect in the proceedings below, it lay in the failure of a quorum of the full committee to make the certification decision. . . ."

It is clear from the foregoing, that the committee lacked a quorum to render its decision. Action of any nature by this committee was illegal in the absence of a valid quorum. As indicated above, counsel for the committee even conceded that:

> **". . . counsel for the committee acknowledged that the committee has not specified what quorum is necessary for the committee to act."** [251]

It's kind of a theory like, "let's just keep it easy, loose and free, so we can do whatever the heck we want." From a perspective of establishing a body of law that the public can have faith and confidence in, this is nothing more than pure amateurish crap. The Court then goes on to irrationally dance its' way out of its' new procedural mess by relying on what case, other than, of course, *518 N.E. 2d 981* (1987) discussed previously herein. That's the case where the Court blatantly violated its' own admission rule and the Dissent questioned the majority's integrity. I am forced to concede that *518 N.E. 2d 981* (1987) does definitely stand for the premise that the Court can chuck court rules and due process into the garbage. If you accept that case, you might just as well let all citizens judge the law on their own.

Addressing now the substantive issue, I would admit the Applicant. The conviction for rape in 1973 is extremely serious, and I am admittedly close to denying admission on the basis of it. Nevertheless, seventeen years have lapsed. The Applicant was actively involved in community and charitable affairs and expressed remorse. In summary, notwithstanding the heinous nature of the offense, it is far remote in time, and both remorse and rehabilitation have been demonstrated. I would admit.

Three other facets of this case should be pointed out. First, the Committee seems to focus more on the issue of nondisclosure with respect to the law school application than the rape offense. The law school application disclosure issue was minuscule in importance compared with the rape offense. When reading the opinion, one can not help conclude that if the Applicant had disclosed the rape offense on the second of his two law school applications, he would have been admitted. Apparently, just disclosing it on the first however, was insufficient.

Second, in reference to the disclosure issue, he did disclose the statute he violated on the first law school application. The Committee's concern focuses on the second law school application prepared after he had already begun law school. Apparently, the law school had a policy whereby it let a student begin law school on the basis of an initial application, and then once he started taking classes, a more comprehensive application had to be completed. That's pure crap! They apparently want the student to relocate geographically, grab their law school tuition dollars, and then once the student is already in and taking classes, they demand what apparently is the "real application?" At that point, the student is committed, and the law school has unfairly leveraged him. The Bar Committee should have been more concerned with the lack of equity in requiring completion of a second law school application.

Thirdly, the failure of the Hearing panel members to actually attend the Hearing demonstrates a callous indifference and lack of respect for the Applicant, his rights and their duties as panel members. They were spitting in his face. In this regard, even if one assumes arguendo, that the warped nature of Bar admission proceedings was constitutionally valid, the Committee members displayed the wrong "attitude" and were not entirely "candid" with respect to fulfillment of their duties.

568 N.E.2d 1319 (1991)

ADMISSION TO THE MEDICAL PROFESSION DOES NOT THREATEN THE ECONOMIC INTERESTS OF OUR ATTORNEYS.
SO, WE CAN RENDER CONSTITUTIONAL OPINIONS IN THIS AREA

This case is not a Bar admissions case. It is however, a beautiful case to demonstrate how the Courts hypocritically deal quite differently with admission into other professions, compared to the State Bar. This case addresses moral character with respect to a medical license application. While the Court as demonstrated herein, is amenable to "evading" constitutional fairness when assessing Bar applications, they adopt an extremely different "attitude" in regard to the other professions.

The Applicant was denied a medical license on "moral character" grounds. A question on the application inquired whether he had ever been denied a license, permit or privilege of taking an examination by any licensing authority. He answered, "No." At an informal conference, he revealed that he had in fact applied for licensure in Indiana, South Dakota and Pennsylvania and had not been granted a license in any of those States. In addition, he failed to disclose his attendance at an occupational school. The Illinois Department of Professional Regulation provided him with notice that it intended to deny his application for reasons, including the following:

"1. You have made false statements to the Department in connection with your application."

Remember, how the Illinois Court denied admission to Applicants to the practice of law on grounds of nondisclosure, or omitted information? Well, now when dealing with Applicants to the medical profession, they are more sensitive to the Applicant. It's almost like they don't want members of the general public to know how they administer the Bar admissions process. They think that by judging other professions in accordance with constitutional standards, they can hide their hypocrisy with respect to the legal profession. Compare the following statements dealing with a medical license application with the preceding cases addressing a law license in Illinois:

> **"We also agree with the plaintiff's contention that the Board's finding that the plaintiff had made "numerous misstatements of material facts" is vague and ambiguous. Even after oral argument, it was not clear to us precisely what statements or conduct on the part of the plaintiff the Board relied on in determining that he had made misrepresentations of material fact.** Consequently, we have been required to examine the entire record. That examination discloses that the procedures followed by the DPR were unusual and, in large measure, unfair to the plaintiff. **Indeed, we conclude that the procedures followed made a shambles of due process."**
>
> **. . .**
>
> **The wish of the hearing officer for the "smallest manageable proceeding" was ignored. Instead, the proceeding on September 9, 1987, was expanded and became both accusatorial and inquisitorial and personally insulting to the plaintiff.**
>
> **. . .**
>
> At one point in the proceedings, the plaintiff's attorney made a proper objection to which the attorney for the Board said this:
>
> > "If I may, I would respectfully suggest that your client's proclivity to lie and perjure himself on applications is very germane to the issue of his character and fitness to be licensed . . ."

We must first address what appears to be a misconception of the law on the part of at least one of the Board members and the attorney for the DPR. The attorney for the DPR argued in this court that a distinction is to be made between actions to revoke or suspend a license and actions to deny an application. . . . Insofar as due process requirements are concerned, there is no distinction. . . .

. . .

The plaintiff argues generally and correctly that administrative proceedings are governed by fundamental principles of due process. . . . He does not, however, point out, as we do, the denials of procedural due process. We anticipate that the DPR will maintain that we have raised an argument that has not been raised by the plaintiff. We concede that may be so. But the rule that points not argued in the appellate court are waived is an admonition to the parties, not a limitation upon the jurisdiction of a reviewing court. This is so because of the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent. . . .

. . .

The Department concedes that, if the plaintiff had informed the DPR that he had previously been denied a license in Indiana, South Dakota and Pennsylvania, the denials of a license in those States would not be a ground for denying him a license in this State. . . . **Because truthful answers would not have barred the plaintiff from being licensed, it is our judgment that any misrepresentation would not be material. In order for a misrepresentation to be material it must appear that the party to whom the misrepresentation was made would have acted differently if he had known the true facts. Lytton v. Cole** (1964), 54 Ill. App. 2d 161."

My gosh, where to begin with this case. It just boggles my mind that Illinois Courts could adopt such a stance with respect to medical licenses, when you consider how they treat law licenses. My favorite part of the opinion is the part cited above that reads:

> **"Because truthful answers would not have barred the plaintiff from being licensed, it is our judgment that any misrepresentation would not be material. In order for a misrepresentation to be material it must appear that the party to whom the misrepresentation was made would have acted differently if he had known the true facts. Lytton v. Cole (1964), 54 Ill. App. 2d 161."**

They sure didn't adopt that premise in all the other Illinois cases discussed previously. Such a proper and correct constitutional standard, apparently does not apply to the legal profession, just the medical profession. In *488 N.E.2d 947 (1986),* the Applicant was denied admission for citing his high school attendance dates as 1970-1974, instead of 1971-1975; along with failing to disclose some residence addresses and having parking tickets. Apply the standard used in this medical license case to that Bar Applicant, and he would have been admitted. The other part of the opinion that's great states:

> "He does not, however, point out, as we do, the denials of procedural due process. **We anticipate that the DPR will maintain that we have raised an argument that has not been raised by the plaintiff. We concede that may be so.** But the rule that points not argued in the appellate court are waived is an admonition to the parties, not a limitation upon the jurisdiction of a reviewing court. This is so because of the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent. . . ." [252]

In the Illinois Bar admission cases, the Court trashes procedure with respect to Rule 708(c) in *518 N.E.2d 981 (1987)*, with respect to quorums and other committee procedural deficiencies in *561 N.E. 2d 614* (1990). Now however, with respect to the medical profession, procedure is the hip thing of the day. In fact, the Court in this case goes so far as to virtually represent the Applicant. It considers arguments the Applicant himself didn't even make. The opinion overall, I have to admit is good. Frankly speaking, I probably wouldn't have gone so far as to make the Applicant's case for him, but other than that it's right in line with the constitution. In comparison to the Bar admission cases however, it is the most blatantly hypocritical thing you could possibly read in your wildest imagination. They do what their supposed to do for the medical profession, but not the legal profession.

646 N.E.2d 655 (1995)

DEFINITELY, A BAD IDEA TO EXPRESS AN INTEREST IN DATING A FELLOW LAW STUDENT

This case involves a Bar Applicant (Plaintiff) who institutes a defamation claim against the Dean of the law school who refused to certify his character. The Dean refused to certify his character in reliance on statements made by a law professor and a law student. The Plaintiff was nevertheless admitted to the practice of law and then filed a defamation action against the individuals who vindictively attempted to sabotage his application. The facts are as follows.

The problems focused on certain friendships the Plaintiff had. He was friends initially with a law professor and a female law student because all were interested in the pro-life movement. Apparently, the Plaintiff also had an interest in the female law student that went beyond the pro-life movement, and was rebuffed. The law student complained to the law professor that he was sexually harassing her. The law professor informed the Dean of the law school. The professor's communication to the Dean stated that he was not morally fit to practice law.

He alleged the following in his lawsuit. He asserted that the Dean had informed him that he was not furnishing the Board of Examiners with the usual certification related to character. Additionally, the Dean solicited comments from faculty regarding the Plaintiff, but took no steps to verify the charges. Much of the information solicited related to personal relationships and public statements he had made related to public policies. The Dean denied the existence of the file, despite requests from the Plaintiff and his representative. The Dean then forwarded portions of the file to the Bar Committee, but withheld portions that were exculpatory in nature. The Dean assured the Committee that the withheld documents would not add significantly to the information already received. The Trial Court dismissed the Complaint without leave to reinstate. Apparently, the Plaintiff's case hit a sensitive area in the legal profession. It is difficult to delineate the reasons for dismissal, because the Appellate opinion states as follows:

> "(The discussion of the court's dismissal of counts III and IV is not to be published pursuant to Supreme Court Rule 23.)
>
> Material nonpublishable under Supreme Court Rule 23
> . . .
> (The discussion of the court's reasoning in dismissing counts VI and VII and imposing sanctions is not to be published pursuant to Supreme Court Rule 23.)
>
> Material nonpublishable under Supreme Court Rule 23."

Now that's American justice in Illinois at its' best. The Appellate Court of Illinois does make the following statements which are interesting regarding the practice of law :

> "There is a **constitutional protection of the right to practice law** if the national requirements of bar admission are met. . . .
>
> . . .The right involved in this case was the right to practice law in Illinois. This right could only be granted or prohibited under the provisions of the rules of the supreme court of this State." [253]

I present this case because it demonstrates how the admissions process adversely affects even those who are admitted. The Plaintiff had to go through the time, trouble and expense of a Bar Hearing and the associated delay that such entails, simply because he apparently expressed a romantic interest in a fellow law student who got offended. That resulted in an apparently baseless claim for sexual harassment by a fellow student (no charges appear to have been filed or any suit instituted against the Plaintiff). The Plaintiff naturally, as would be expected got defensive. The Dean and the law professor got ticked off and tried to sabotage his legal career. The Court does note that the ability to practice law is a right. And yes, they even said it was a constitutional right.

SUPREME COURT OF ILLINOIS, No. M.R.16045; Versuslaw 2000.IL.0042979 (12/01/2000)

WE AT THE STATE BAR LACK CANDOR WHEN WE EMPHASIZE REHABILITATION; IT REALLY DOESN'T MEAN ANYTHING TO US

The Applicant was convicted in 1988 of insurance fraud, and sentenced to 30 month's probation As a condition of probation, he was required to complete 950 hours of community service, and pay $ 5000.00 in restitution. His probation was satisfied in 1990. On his law school application, he failed to disclose three previous misdemeanor convictions. He graduated from law school in 1994 and was denied character certification in 1995 on the ground that he had not adequately demonstrated that he was rehabilitated.

The Bar Committee falsely concluded that "*specific*" evidence of rehabilitation was lacking. At the Bar Hearings, he submitted the following "*specific*" evidence in support of showing rehabilitation. He had engaged in volunteer and charitable activities beyond those necessary to comply with the terms of his probation. "*Specifically*," he worked in the community defender office and served as a teacher of English as a second language at a local community college adult education program. "*Specifically*," he also performed work caring for elderly and infirm patients. He presented the "*specific*" testimony of seven character witnesses. An Illinois Associate Circuit Judge testified that he had worked at the community defender office on an "as needed" basis. The director of the community defender office also testified that the Applicant was honest, trustworthy and dedicated. The program director for volunteer adult education teaching described his work at the college. She testified that he was generous in donating his time, dedicated to his students and trustworthy. A Chicago police officer and two law school professors also testified on behalf of his character. In addition, he presented affidavits from a U.S. District Judge and the Dean of the Law School, both of whom supported his application and attested to his fitness. He also testified that he was truly remorseful for his prior conduct and intended to continue his volunteer work regardless of the Bar's decision on his admission.

How much more "*specific*" evidence the Applicant could possibly have submitted is truly beyond my comprehension. The Bar's conclusion that "*specific*" evidence was lacking, was blatantly false, demonstrating a lack of candor and truthfulness on their part. This is a fact whether or not the "*specific*" evidence he presented was sufficient to demonstrate rehabilitation.

The majority opinion of the Court affirms the Bar's decision to deny admission. An extremely well-written Dissenting opinion possesses the logic and rationality that is markedly absent from the irrational majority opinion. The Dissent writes eloquently as follows:

> "As I studied and pondered the majority opinion, one lingering question always remained: What more could petitioner have done that he did not already do to enable him to be allowed the privilege to practice law? Stated otherwise, is there anything petitioner failed to do to justify refusing him a license to practice law. The majority does not answer this essential question. . . .
> . . .
> The analysis employed by the majority in assessing the merits of petitioner's admission petition does not adhere to this court's prior pronouncements with respect to evaluating whether an individual has shown sufficient rehabilitation. . . .
> . . .
> . . . Inexplicably . . . both the Committee and the majority discount the value of this uncontradicted evidence, and instead resort to mere speculation and unsupported conclusions as the basis for denying petitioner's application for admission to the bar.
> . . .

. . . the majority has determined that regardless of the amount of positive evidence presented in petitioner's favor, the nature of petitioner's offense automatically precludes his admission to the bar.

The clear and unmistakable effect of denying the opportunity to sit for the bar examination is to impose additional punishment upon him after he has been tried and served the sentence which was deemed appropriate by agreement of the court and the prosecution in the criminal case. . . . "Once an offender has served his sentence, the punishment must stop." . . . In the case at bar, the punishment has not stopped, but continues. . . ."[254]

INDIANA

585 N.E. 2d 1334 (1992)

DISCLOSING ANY INCIDENTS OF A "DEROGATORY NATURE" INCLUDES WHAT YOU DID IN GRAMMAR SCHOOL

The Applicant (Respondent) filed an application for admission to the Indiana Bar in 1982 and was admitted. Years later, he was charged in disciplinary proceedings with making a material false statement and failing to disclose a material fact in connection with his application. Question 11 of the application asked the Applicant to list other states in which he had applied for admission. He failed to disclose that he had applied to the Rhode Island Bar and was denied admission because he had not graduated from an ABA law school (Indiana apparently did not require graduation from an ABA law school). Question 18 inquired about any incidents of a derogatory nature and the Respondent answered, "none." He failed to disclose in 1973 (9 years before his application and nineteen years before the Court's opinion) that he had been arrested for his alleged role in a drugstore robbery. The charges were dismissed. In 1976, he was arrested for breaking and entering a motor vehicle, but was found not guilty at the probable cause hearing. In 1978 he was arrested for possession of stolen property and the case was dismissed. The Supreme Court of Indiana's opinion states:

> "At his very first encounter with a situation calling for sound professional ethics, this Respondent embarked on a path of deception. The nature of this violation indicates a serious lack of candor which reflects negatively on a lawyer's integrity and professional status." [255]

The Court suspends him from the practice of law. I see this case quite differently than the Indiana Court. Since his Rhode Island admission was denied because he had not graduated from an ABA law school, rather than on character grounds, disclosure would not have affected Indiana's decision. It is therefore immaterial, applying the proper constitutional standard for nondisclosure.

The issues pertaining to Question 18 which makes inquiry about "any incidents of a derogatory nature" are much more serious and reflect quite negatively on the issue of character. The character of the Bar and State Supreme Court, that is. The question is garbage suffering from constitutional infirmity due to vagueness, overbreadth and ambiguity. The question based on its express mandate, would require listing of derogatory incidents dating back to an Applicant's birth. Derogatory incidents such as when they were four years old and took a cookie from the cookie jar, when they were in second grade and lipped off to a teacher, threw some food in the school cafeteria at age seven, spit up at the dinner table when they were 9 months old, took a leak in a back alley after drinking beer with friends at age eighteen (while underage), and the list would be completely endless.

Also, what's considered derogatory to one person, may not be derogatory to another. I think the manner in which Bar committees usurp the constitution is conduct of a derogatory nature. I assume however, the State Bars disagree with me. Similarly, I assume they would believe the ideas I express in this book reflect poorly on me. Naturally, I disagree.

Determining what is "derogatory" is not an easy thing to do. Some people think certain comedians tell derogatory jokes in bad taste, while others think those same comedians are hilarious. Some people think lawyers are scum, while the Bars seem to feel the practice of law is a time honored profession exemplified by respect and dignity. Some people think that those who call the legal profession an "honored profession" lack candor and are being untruthful.

Furthermore, if different people consider different things to be derogatory, does that mean disclosing something you <u>think</u> is derogatory, but which the Bar determines is not derogatory,

constitutes lying? The listing of an incident ultimately determined by the Bar to not be derogatory, would then have the effect of reflecting worse on the Applicant's candor, than failing to disclose. Let's now apply the requirement of listing "any incidents of a derogatory nature" to the Respondent's failure to disclose his arrests for three incidents, two which were dismissed, and one of which he was found not guilty. My analysis is as follows:

> The U.S. Constitution presumes a person is innocent until proven guilty. The Respondent in this case was therefore, as a matter of law innocent since he was never found guilty of any the charges. Since the Respondent was innocent, the incidents, do not reflect upon him in a derogatory manner. Therefore, if the Respondent does list the arrests, he is answering the question incorrectly. To this extent, listing the arrests would constitute an improper attempt to classify his innocence as derogatory in nature. Since however, he failed to disclose the arrests, he was being completely and absolutely truthful.

Admittedly, in the foregoing passage I play the same manipulative game of logic that the Bars play. But it shows how subjective standards are unworkable. The question, simply put, was garbage. To discipline this man was an abuse of authority by the Supreme Court of Indiana in an arbitrary and capricious manner.

Supreme Court of Indiana, No. 49S00-9512-DI-1329; Versuslaw 1996.IN.469 (1996)

YOU DID A VERY GOOD JOB FAILING TO DISCLOSE INFORMATION ON YOUR APPLICATION, SO WE'LL ONLY GIVE YOU A REPRIMAND. YOU PLAYED BALL WITH US, SO WE'LL PLAY BALL WITH YOU.

The Applicant (Respondent) filed an application to the Indiana Bar in 1993 and was admitted. He was subsequently charged with failing to provide full disclosure on his application. Question number 17 of the application requested that he provide a listing of every civil court proceeding in which he had been a party. He failed to disclose that he had been the defendant in three lawsuits. Question number 18 made numerous inquiries that included traffic offenses. He failed to disclose that he had received a speeding ticket. Question number 19 inquired about arrests. He failed to disclose that he was arrested in 1984 for public intoxication. No charges resulted. He failed to disclose on his Florida Bar application that he had two delinquent debts. These were his nondisclosures. Three civil lawsuits, one speeding ticket, one 9 year old arrest and two past due debts. He was given the sanction of a public reprimand. The Court states:

> "The parties agree that the respondent's misconduct was the result of negligence rather than an intent to deceive. . . . In attorney disciplinary actions, a "negligent" state of mind, where a lawyer "fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that reasonable lawyer would exercise in the situation," is viewed as the least culpable of mental states." [256]

The Court distinguishes the sanction in this case (a public reprimand) with the nondisclosure sanction of a one year suspension in *585 N.E. 2d 1334 (1992)* , on the ground that the nondisclosures in this case were a result of negligence, rather than intent. The cases considered together raise a more disturbing issue.

I have indicated herein that I believe the admissions process is unconstitutional because the application inquiries are unconstitutional. Most particularly, they violate Freedom of Speech protections and the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, if we work from the assumption (even though it is an invalid assumption) that I am incorrect and the admissions process is wholly constitutional and the questions entirely proper, these two cases raise an ethical dilemma.

Quite simply put, both Applicants benefited by failing to disclose matters on their application. They got admitted. Then once admitted, after their purported nondisclosures were discovered, they received respectively a one year suspension, and a public reprimand. It is clear, that even assuming the admissions process was constitutional (which I do not believe it to be), an Applicant is better off lying during the process if he thinks he can get away with it, even if that lie may be discovered subsequent to admission. This I find to be an unacceptable result.

The Bar rewards the admitted Applicant with public reprimands, while penalizing Applicants caught during the process by denying admission. It is an absurd result. Rather than condoning such an absurd result, unconstitutional questions should not be asked during the admissions process. It is none of the Bar's business to inquire about an individual's personal debts, arrests resulting in no conviction, residences or jobs extending more than five years back prior to the application, or speeding tickets. The Bars are just setting themselves up to look hypocritical and foolish.

In attempting to squeeze all personal information out of the Applicants, the Bars jeopardize the foundation of their legitimacy. They play an imprudent game which once publicized can not help but lead to a divestment of their power which otherwise would have been uncontested.

Supreme Court of Indiana, #43S00-9709-DI-479;Versuslaw 1999.IN.0042503 (1999)

WE'RE NOT CONCERNED AS MUCH ABOUT YOUR CONVICTION FOR VIOLATING FEDERAL LAW, COMPARED TO THE BIGGER ISSUE OF NOT UPDATING YOUR BAR APPLICATION

The Applicant applied to the Indiana Bar for admission. In September, 1995, while his application was pending, he was "interviewed" by the FBI about downloading child pornography on the Internet. At the time, he was a law student. After the interview, he believed nothing further would come of the matter. He was also unaware that such downloading violated federal law, which was a believable contention in 1995, during the early years of the Internet.

He did not inform the Indiana Bar about the FBI interview, or update his application. He was admitted to the practice of law in October, 1995. In April, 1996, he was charged with the downloading of the images, pled guilty and was sentenced to 15 months in prison. Disciplinary action was then instituted against him by the Indiana Bar for failing to update his Bar application regarding the FBI interview. He was suspended for a minimum period of two years. The two application questions that allegedly addressed the matter were (19) and (20). Question 19 stated:

> ". . . I have been accused of the following violations of law (Note: (a. Set out date, city and state, name of person who made the accusation against you, the law enforcement agency involved, if any, and any disposition. (b. Give specific details of the accusation and a full description of the incident. . . .)"

The foregoing question positively does not encompass the FBI "interview." He was only "questioned" by the FBI in September, 1995. At that time, no formal accusation was made. As a matter of law, an accusation by a law enforcement agency requires a "charge." Without a "charge," there is no "accusation." At most, there was a suspicion or belief that he committed a crime. He was therefore technically correct to not update his response to Question 19. Question (20) inquired as follows:

> "Within the meaning of the term "good moral character" and "fitness" to practice law . . . I have read and understand, since I became 18 years of age the only incidents in which I have been involved **where there was any challenge to my honesty and integrity** are as follows:"

The downloading did not challenge his "honesty" or "integrity." No doubt, it was a serious violation of federal law, but it was not related to honesty or integrity. In any event, Question (20) is constitutionally infirm. The inquiry focuses on "incidents" challenging one's honesty and integrity, since age 18. It is ambiguous, vague and suffers from substantial overbreadth. It requires a subjective analysis of what constitutes "good moral character," and what constitutes "any challenge."

For instance, if you tell a friend you will meet them at 5:00, and then arrive at 5:15, does their statement that "you said you would be here by 5:00" constitute a challenge to your honesty. The question is clearly impossible for any human being to answer. To even attempt such would require submission of hundreds of pages detailing numerous interactions with friends and family members over a long period of years.

My conclusion therefore, is that the Applicant was not required to provide additional information as a result of the FBI interview. The matter was simply not covered by the scope of either Question (19) or (20), and Question (20) was unconstitutional suffering from substantial overbreadth, vagueness and ambiguity in violation of the First Amendment.

The foregoing conclusion I have reached does not mean however, that he should escape discipline with respect to the matter. Quite to the contrary. He was convicted of a serious crime. That in and of itself, warrants severe disciplinary action. Stated simply, the Bar and Court should have disciplined him solely based on the conviction, rather than trumping up a lame allegation that he failed to update his Bar application to reflect the FBI "interview."

One last point on this case. It is noteworthy to point out that even if he did have a responsibility to update the application (which he did not based on the questions included on the application), from a strategic perspective he made the right decision in not doing so. The reason is as follows. By failing to update the application, he succeeded in gaining admission to the Bar and was then suspended for two years. If however, he had updated the application, he probably would not have been admitted at all. It is clear that the admissions process rewards a failure to disclose, if one successfully conceals the information until after they are admitted. The process is therefore irrational. [257]

IOWA

Versuslaw 2001.IA.0000318; No. 53/01/0002

BAD ATTITUDE

The Applicant in this case was denied admission simply because the Iowa State Supreme Court didn't like his attitude. He was denied admission to take the Nebraska Bar exam, and then applied in Iowa. The Court's opinion states:

> "His problems in both states result from his failure to establish he is a person of honesty, integrity, and trustworthiness. . . ."

The Court's statement lacks candor, and raises substantial question as to the Court's honesty, integrity and trustworthiness. Based on facts set forth in the opinion, the Applicant was denied admission because he consistently utilized appropriate legal means to stick up for his constitutional rights.

The Applicant had two arrests. One arrest was for shoplifting a $ 3.99 socket wrench at a Sears store and the other for failing to display proper license plates. In response to the Sears arrest, he then sued Sears for false arrest, negligence in failing to adequately supervise its personnel, and conspiracy to batter and slander. The Applicant's wife was interestingly, having her own application to take the bar examination challenged at the same time. She also sued Sears and employees. Both the Applicant and his wife then moved to Disqualify the trial court judge. I like this couple very much.

The suit was ultimately dismissed. The Sears lawyer then expressed his opinion that the Applicant lacked the integrity to be admitted. Oh my, isn't that so very surprising? Opposing counsel in a litigation is not in favor of admitting the opposing party to the State Bar. The testimony of the Sears lawyer with respect to the issue of character in the Bar admission proceeding was not in my view, worth Dogshit. Or perhaps, that was precisely what it was worth. He was the opposing lawyer. Anything he says should automatically be ignored. Regarding the second arrest, the Court writes:

> "He was stopped on February 20, 1993 for not having proper license plates. He demanded a jury trial, and the jury found him guilty. He filed a motion for new trial, which was denied, and he then appealed the conviction. . . . The litigation spawned by the traffic citation lasted over six years."

The foregoing is absolutely meaningless with respect to the issue of his admission to the Bar. First of all, the charge was essentially trivial in nature. Second of all, he was absolutely entitled to utilize legal means to oppose his conviction. It's simple as that. For the Iowa Supreme Court to hold doing so against him, reflects adversely on the moral character of the State Supreme Court Justices. Most notably, the Iowa Supreme Court states as follows:

> "An applicant has no natural or constitutional right to practice law in this state. . . ." [258]

By making the foregoing irrational and mentally unbalanced statement, the Iowa Supreme Court usurped the authority of the U.S. Supreme Court, engaged in false disclosure, misleading disclosure, and evaded the truth. The simple fact of the matter is that the ability to practice law is a fundamental constitutional right. Any State Supreme Court Justice that says otherwise is nothing less than a liar. This was nothing more than a bad attitude case. The Iowa Supreme Court had a very bad attitude.

LOUISIANA

SC-LA Case No. 97-OB-1004 ; Versuslaw 1998.LA.42812 (1998)

NO ONE KNOWS WHY

Discussion of this case will be quick. The reason is that the Supreme Court of Louisiana issued an opinion that does not in the slightest manner disclose the facts of the case or the reason for denying admission. It's a four paragraph opinion. The Applicant graduated from law school and applied for admission. The Committee declined to certify based on issues pertaining to his moral fitness. What those issues were, you can not tell from the opinion. After oral arguments, the content of which is unknown, he was denied admission. One year later, he reapplied for admission and was again denied certification based on character issues. He filed a response, the contents of which are unknown from the Court's opinion. Oral argument was conducted, the substance of which is unknown. After considering the commissioner's recommendation, the briefs of the parties and the evidence, the Court concluded he failed to provide satisfactory evidence that he is of good moral character. [259]

Why? I have absolutely no idea, after reading the Court's purported opinion. That's crap!!

485 So.2d 171 (1986)

The Applicant (Plaintiff) instituted suit against an attorney, his law firm and his clients seeking damages for alleged defamatory remarks contained in a letter written by the attorney to the National Conference of Bar Examiners (NCBE) in response to an inquiry relating to his application to the District of Columbia Bar. The Louisiana Court of Appeal's opinion states as follows:

> "Although we find that the remarks contained in the letter were defamatory and false, we hold that plaintiffs are not entitled to recover because of lack of malice on the part of the defendants, conditional privilege, a release of liability executed . . ."

The letter written to the NCBE accused the Applicant of furnishing data that was false and misleading in a sales presentation to defraud purchasers of a company who were clients of the attorney. The attorney had represented people in a lawsuit in which the Applicant was the opposing party. This case demonstrates how the admissions process is utilized in unrelated litigation to "get even" with an opposing party. The letter sent by the attorney to the NCBE stated in part:

> ". . . Concisely, the "legal qualifications" of <Applicant>. . . are severely impugned by his lack of business integrity, and it is the opinion of the clients of this firm that he is not of good moral character and that his legal qualifications are of a low nature, considering the additional factor that . . . did not keep and maintain requisite corporate documents . . .
>
> In conclusion, the moral character of <Applicant> . . . is seriously attacked by the clients of this firm and his legal qualifications are therefore subject to his lack of moral turpitude and character. . . .

> In the opinion of the clients of this firm, if a similar request for response were made by the Bars of California and Louisiana, they would respond that he should not maintain his membership and should be disbarred for his acts and conduct. . .” [260]

In my opinion, the Bar should not allow solicitation of such information. Here you have a bitter attorney, who is presented with a carte blanche opportunity to sabotage the career of an opposing party in a lawsuit. Once the Applicant executes the liability release required by the NCBE, opposing counsel can vindictively defame him with no risk. That’s wrong. The admissions process must be kept separate from unrelated litigation. To this extent, it should not allow inquiry into such litigation as this case amply demonstrates.

If an Applicant’s conduct during litigation is illegal, then assuming they are prosecuted and convicted, it would become part of the application process. If the Bar requires the Applicant to disclose unrelated litigation and inquiry is then made of opposing counsel, basic predicates of human nature create a high likelihood that such inquiry will result in negative feedback. The admissions process becomes a tool of leverage to be used against the Applicant in unrelated litigation. Opposing counsel typically has interests that are naturally adverse to those of the Applicant. Otherwise, their would have been no litigation.

The defamatory letter in this case, in all likelihood resulted in unjustly lengthening the admissions process. A shameful textbook example of perverting the admissions process. Shameful to the extent that solicitation of information from opposing counsel was allowed, and also that disclosure of the litigation was required by the Applicant.

1999.LA.42293 (1999)
No. 97-OB-1564

The Committee opposed admission of the Applicant, who was a female. The Court also denied admission, with the majority failing to disclose facts supporting their conclusion. The Dissent however, presents the applicable facts which are most enlightening.

Her character was initially certified and she passed the Bar exam. Loyola University later objected to her admission stating that she was the subject of an investigation involving embezzlement of funds from law student accounts. The Dissent writes as follows in regards to the proceedings before the Louisiana Bar and Court which appear to have been most unconstitutional in nature:

> “**This entire process fails to satisfy due process requirements because the commissioner we appointed to this case allowed Loyola University to take over these proceedings**. I would await a final resolution of these embezzlement charges by the petitioner’s accuser before reaching a decision on her moral fitness.” [261]

The Dissent was right. The majority looked like cowards for not presenting the facts, and was over eager to foster the anticompetitive interests of the Bar by denying admission, before the embezzlement issue was even resolved.

2000.LA.0043085; No. 00-OB-2676 (La. 10/04/2000)

The Court's opinion states:

> "On his application, petitioner disclosed an unpaid child support judgment, and he provided . . . a detailed explanation of the circumstances surrounding the judgment. **However, petitioner failed to provide "written proof of a payment plan" with his former wife**; as a result, the Committee informed him that he did not satisfy the burden of establishing good moral character. . . .
> . . .
> . . . we conclude petitioner is eligible to be **conditionally** admitted to the practice of law in Louisiana, subject to a probationary period of eighteen months. During this period, petitioner shall provide evidence to the Committee, on at least a quarterly basis, demonstrating that he has made a good faith effort to satisfy his financial obligation to his former wife. . . ."[262]

Unless the Louisiana Supreme Court is amenable to Disbarring or placing on Probation, each and every licensed Louisiana attorney and Judge who is behind on child support payments, they are way out of line with their opinion. The conditional admission and terms of probation are irrational Judicial crap. The Applicant should have been admitted outright.

MARYLAND

316 A.2d 246 (1974)

This is a reinstatement case somewhat similar to the Hiss case in Massachusetts. The Applicant was admitted to the Maryland Bar in 1941. In 1952, he was convicted of "conspiracy to teach and advocate and to organize the overthrow of the government by force or violence in violation of the Smith Act." He was disbarred in 1955. In 1973, eighteen years after disbarment, he filed a petition for reinstatement. The Maryland Bar Association supported reinstatement. Similar to Hiss, during the reinstatement proceedings, the Applicant continued to assert his innocence. The opinion states:

> ". . . this panel cannot consider as having any effect Petitioner's testimony before us that his conviction was founded on insufficient evidence and that he was innocent of the crime charged. Rather he remains a convicted, unpardoned felon.
>
> Proceeding from this restricted basis, what consideration can this panel give to the nature and circumstances of Petitioner's original misconduct? We find relevant the position taken by the Maryland State Bar Association that Petitioner's misconduct which resulted in his conviction was largely political in nature. . . . We find it amply demonstrated that developments in the law have necessitated a change in judicial and prosecutorial attitude. **We also believe that since Petitioner's disbarment public acceptance of the change in legal attitude, public attention to civil rights generally and the right of dissent particularly,** and public emphasis on detente with communist nations in our foreign affairs all have tempered the attitude of the public toward one in the Petitioner's position. . . ."
>
> **. . .**
>
> **"As to Petitioner's reformation, the Baltimore Bar Association raises the philosophical question of how Petitioner has proven his reformation when he refuses to recognize the existence of any misconduct from which to reform. Since Petitioner is adamant in his belief in his innocence, he is consistent in not expressing any repentance. While he seems to hinder his cause by not taking what might be the easier way of confession and contrition, the intellectual honesty of his position must be recognized."**

The Court then reinstates him. The Dissent makes an interesting statement as follows:

> **"While the courts have repeatedly said that it should require much stronger proof of good character to restore a disbarred lawyer than that required on admission, nevertheless, lawyers are continually being reinstated, after disbarment, for conduct which any character committee would have unquestionably held to preclude their original admission. Instances of this kind, often manifestly unjustified, are most injurious to the reputation of the bar in the eyes of the public."** [263]

While I agree with the majority's decision to reinstate, I also agree with the point made by the Dissent. The solution to bringing the reinstatement standard into conformity with the original admissions standard, is to restrict character inquiries to convictions, and eliminate the questions pertaining to litigation, demeanor, attitude etc..

It is noteworthy to mention again, that licensed attorneys in many states when sending in annual renewal forms, are not even required to inform the Bar whether they have been convicted of a crime. If the Applicant must provide voluminous amounts of character information, how can the failure to require renewing attorneys to even disclose whether they have been convicted of a crime be justified? It is an egregious violation of the Equal Protection Clause.

It is wholly irrational to require Nonattorneys to submit overly broad character information, when licensed attorneys are not required to do the same periodically. By the same token, it is not practical to require licensed attorneys to submit complete character questionnaires with renewals, since the Bar would be logistically unable to review the massive volume of information. The solution therefore is to only require disclosure of convictions by both Nonattorney Applicants and renewing attorneys. For the most part, that should be it. Just like the CPA boards do.

Then the admissions process would no longer be in violation of the Equal Protection Clause, as well as the First Amendment. It also would not wreak of inconsistency.

387 A.2d 271 (1978)

CRIMES OF THE CENTURY!!
THE $4.99 TAPE MEASURE HEIST. THE BOTTLE OF RUM CONSPIRACY THEFT

The Applicant entered college at age 16. He disclosed that in 1966, at age 19, during his junior year in college, he was arrested for stealing a bottle of rum. He also disclosed that in 1971 he was arrested for stealing a $ 4.99 tape measure. During the Bar Hearings, he testified that he stole the bottle of rum after meeting two young women while on a vacation in California. He did it on a "dare" to impress them. He took the bottle of rum from the supermarket and concealed it under his shirt. He was caught, charged with petty theft and the case was dismissed. Notwithstanding the dismissal, he readily admitted to the Bar Committee that he was guilty of the offense.

He entered law school at age 20 (this guy is incredible, in my opinion). After his first year he left and entered a medical school in Spain. At that time, he had strong feelings against the Vietnam War. He said he was disillusioned that the truth was not being told to the American people. He said he lacked respect for American institutions, opposed capitalism, the Dow Chemical Company and bombs. In May, 1971 during his senior year of law school, he participated in the May Day demonstrations in Washington, D.C.. Along with other demonstrators, he was picked up by police, briefly detained, but not arrested. He graduated from law school in 1971 at age 24.

With three other law school graduates, he began a communal farm on a 30-acre plot of land. They began building their communal house and needed a tape measure. The Applicant went to a department store and took a tape measure worth $ 4.99 by placing it in his pocket. He said that stealing the tape measure was an act symbolic of his disrespect for the system. He was arrested for shoplifting, obtained counsel and the case was dismissed. He then became a carpenter. Shortly thereafter, he left the farm and found work as a busboy, waiter, and law clerk.

He testified that after his arrest in 1971 he began to undergo a transformation. He came to see how the law worked and that it was really made for the people and to protect the people. He passed the 1976 Bar exam. At the time of the hearing on his application, he was 29 years old. He was no longer rebellious, and characterized his criminal transgressions as immature, idiotic and a mistake. He was contrite and remorseful, and freely admitted his guilt even though the charges were dismissed. The Character Committee concluded he was of good moral character and recommended admission. The State Board of Law Examiners decided that grounds existed for denial of admission. They stated:

> ". . . We are of the opinion that applicant learned little from the California arrest, which of itself should have prevented the Montgomery County arrest. Further, the Board is not persuaded of the sincerity of applicant in describing the act in Montgomery County as being a symbolic act, since his subsequent conduct was inconsistent with such a motivation. In this regard, the Board is of the opinion that in his testimony before the Board and before the Character Committee, applicant was less than candid. . . . He attempts to explain away the California incident as a youthful prank and an attempt to impress new-found friends, he describes the Montgomery County incident as a symbolic act. . . .
>
> The Board has considered the many letters of recommendation submitted by outstanding citizens; the testimony of his character witnesses . . .; the unanimous opinion of the Character Committee . . . . On the basis of the record before us, we conclude that the applicant has not met the burden of proving his good moral character. . . ."

The Court grants admission. In reference to the Board's assertion that he lied by classifying the tape measure theft as a symbolic act, the Court writes:

> **". . . To conclude on such a flimsy foundation that the applicant lied to the Board as to his reason for committing the 1971 offense . . ."**

In my opinion, this case borders on the ridiculous. It exemplifies the arbitrary nature of State Bar decision-making. You could not possibly have an Applicant who was more forthright. **He disclosed the arrests even though the charges were dismissed.** As a matter of law, he was innocent. Nevertheless, he owned up to committing the offenses. **Yet he is still irrationally classified as a "liar" by the Board, <u>because they believe he didn't state the proper reason for the theft.</u>** The theft of a $ 4.99 tape measure. A moronic Dissent writes as follows:

> **"Since the time of Moses, if not before, "Thou shalt not steal" has been understood as one of our basic legal and moral tenets. . . ."**

This very first sentence in the Dissent illegitimates it. It is a blatant violation of the constitutional principle mandating separation of Religion and State. As for the bottle of rum incident, the Dissent states as follows:

> ". . . four young people traveling together, though they had enough money to pay for what they wanted, chose not to use it, and instead **conspired** . . . they would enter a supermarket for the specific purpose of stealing. . . ."

Conspired? Now the Applicant is accused of being involved in a Conspiracy for stealing a bottle of rum? The Dissent later writes:

> ". . . The day upon which the Board recommends to this Court the admission to the Bar of a person whose candor and truthfulness the Board itself does not believe--the day the Board affirms the present moral character of a person while at the same time doubting the sincerity of the very statements that person makes to it--will indeed be a day upon which the Board stands the law upon its head."

The Dissent closes as follows:

> ". . .The point, however, is that **it is only the Board, and not this Court, which is in any position to determine whether he genuinely entertained those beliefs**. . . ." [264]

392 A.2d 83 (1978)

ARBITRARY and INCONSISTENT

The Applicant in 1968, at age 18 was charged with breaking and entering. He was found Not Guilty and the arrest record expunged. At age 19, he was charged with assault and battery upon his father. The charge was dropped and the arrest record expunged. In 1971 at age 20, he was charged with aiding and abetting shoplifting. The charge was not prosecuted. That same year, he was charged with stealing a watchband. He pled no contest and was placed on probation for one year. He admitted his guilt of this offense during the Hearings. While on probation, he was charged with attempting to steal a tape deck from a car. He again pled no contest, was fined $ 100 and his probationary status was continued. He admitted his guilt of this offense also during the Hearings. He had fully revealed his criminal record on the application. In 1972, he was employed as a computer programmer by the Social Security Administration. In his application for employment he stated under oath that he had not been convicted of any criminal offenses. He explained that his negative answer to this inquiry was based upon advice of two different lawyers, that the court's acceptance of his nolo contendere ("no contest") pleas did not constitute convictions. He presented corroborating letters from each of the lawyers consulted.

He graduated from law school in 1976 receiving several awards and honors. He was not involved in any criminal conduct since his arrest in 1972. He told the Character Committee that his criminal conduct was "a result of my stupidity and immaturity." He said that he changed the direction of his life and was fully rehabilitated.

The Character Committee concluded he did not possess the necessary moral character, but the Board of Law Examiners concluded that he did. Although I agree with the Board's decision, I am unable to reconcile their conclusion that this Applicant with two "no contest" pleas, possesses the necessary moral character, when they determined that the Applicant in the preceding case who had two arrests and no convictions did not. The Board's decision is wholly inconsistent with their position in *387 A.2d 271 (1978)*. It exemplifies the arbitrary nature of the Board's decision making process. The Applicant with a cleaner record is denied admission, while the Applicant with the equivalent of two convictions is recommended. Conversely, the Character Committee's decision in this case although incorrect, was not inconsistent with the prior case. The Court ultimately denies admission. The Court, similar to myself compares this case with *387 A.2d 271 (1978)*. Both involved petty thefts. This case however resulted in "no contest" pleas, while the former resulted in dismissals.

I would admit the Applicant in this case, but it's a close call. Since the 1972 incident, he worked on a volunteer basis with the County Mental Health Association. He was President of the Student Bar Association while in law school and was treasurer for one year. He seems to have rehabilitated himself and his record has been clean since 1972. The offenses were not heinous in nature, although they were not trivial either. A close call, but since the burden should rest with the Bar when depriving an Applicant of the fundamental constitutional right to practice law, and since that burden was not met here, I would admit. [265]

407 A.2d 1124 (1979)

CHICKEN, CHEESE and STEAK IN YOUR PANTS?

This is an interesting case, particularly in light of the prior Maryland cases involving petty thefts. The Applicant was born in 1949. He served as president of student government at the University of Maryland, as president of the Inter-residents Hall Association and president of the Hill Area Council. Later he was designated as chief justice of the Honor Court of the University of Baltimore Law School. Question 11 of the Bar application required submission of a record of any criminal proceedings which involved him. He was instructed however, to not "report any arrest or court proceedings, the record of which expunged pursuant to law." Question 17 required him to list "**any unfavorable incidents in life**, whether at school, college, law school, business or otherwise, **which might have a bearing upon his character** or fitness to practice law. . . ."

He informed the Board in a letter that he was twice involved in shoplifting incidents, but the records of both incidents were expunged. In 1974, at age 24 he was arrested in a supermarket for taking chicken and cheese. The Court grants admission in a brief opinion that includes the following:

> "The two petty theft offenses, for which the applicant was placed on probation without verdict, having been legally expunged under the provisions of Maryland Code . . . and **the State Board of Law Examiners having declined to consider such offenses** in determining the moral character of the applicant for admission to the Bar . . .

I agree generally with the Court's opinion, but find it remarkable that the Board would not even consider the two petty theft offenses in this case, when they made a character determination against the Applicant in *387 A.2d 271 (1978)*, whose petty theft offenses were dismissed. I do agree that since the offenses were expunged, they could not legally be considered. Nevertheless that does not resolve the inconsistency with the Board's stance in *387 A.2d 271 (1978)*. The solution to achieve consistency is to consider only convictions. Otherwise, the Board is inconsistent by not considering petty theft offenses, or alternatively breaks the law regarding expungements, if it does consider them. The applicable Maryland Code expungement provision stated:

> "makes it "unlawful for any person having or acquiring access to an expunged record to open or review it or disclose to another person any information from it without an order from the court which ordered the record expunged. . . ."

The bulk of the opinion in this case is written by a stinging Dissent. It first states:

> "Because the order in this matter reflects none of the facts, I shall set forth such as are necessary to a clear understanding of the matter before the Court."

I wholeheartedly agree with this point of the Dissent. The opinions must recite all relevant facts to render a clear understanding. Otherwise, the Court looks Machiavellian. The Dissent then outlines facts, including the line of questioning that took place during the Bar hearings. The following transpired with reference to the chicken and cheese shoplifting incident:

"Q. Where did you place it that time?

A. Down my pants.

Q. And when you say "down your pants," how did you --

A. Down the front of my pants.

Q. Down the front of your pants?

A. Yes."

Then with reference to the second shoplifting incident:

"Q. All right. So you went into the store, and if you can picture yourself in the store at that time, did you walk directly to the meat counter?

A. No. . . . went to get some sodas and then I went to the meat counter . . . I said, "I am going to pick up some steaks," and I put them down my pants."

Other minor incidents came out during questioning, which demonstrate the improper manner in which the admission committee proceeded:

"Q. I am going to ask you this other question. **I don't know whether it is even a fair question,** but I am going to ask it to you. Have you--after the age of 17, did you ever shoplift anything else other than at these two times?

A. **You asked me that when we met the last time, and then said, "No, I don't want to hear the answer."** I stated somewhat to the effect that -- . . . "I did it ten times or five times.". . . I know it would never have been anything but food. . . .

The Applicant later described a raid that he and other members of the Allegany High School football team made on a food table set out by the alumni of Bruce High School. He described a series of incidents in high school associated with cokes, cookies and soft drinks sold on the honor system. He recalled being accused of taking 2 roasts from the faculty lounge at the University of Maryland (I would love to have attended this hearing). Chicken, cheese, steaks, roast, cokes, and cookies! Admit this guy to the Bar, just don't invite him to the annual State Bar banquet! The Dissent miserably drops the ball, in an embarrassing manner when it states:

"Mr. Justice Field said for the Court in Ex Parte Garland . . . "The admission or <the> exclusion <of persons as attorneys> is not the exercise of a mere ministerial power. It is the exercise of judicial power. . . ."

. . .

. . . In my view, however, since such an evaluation is a judicial function **the expungement of the criminal record is of no significance** and the General Assembly is without power to specify otherwise as to a potential member of the Bar."

What the Dissent is suggesting, is that he believes Judges do not need to abide by laws enacted by the General Assembly. He says, the "expungement of the criminal record is of no significance." Black's law dictionary defines the term "expunge" as follows:

> Expunge - To destroy; blot out; obliterate; erase; efface designedly; strike out wholly.

The Maryland Code on expungement at the time read:

> "makes it "**unlawful** for any person having or acquiring access to an expunged record **to open or review it or disclose to another person** any information from it without an order from the court which ordered the record expunged. . . ."

Based on the above cited Maryland Code expungement provision, the Court of Appeals broke the law by even including facts pertaining to the expungement in its opinion. While Courts should disclose necessary facts relevant to supporting their opinion, they should refrain from presenting facts which they are precluded by law from considering. The Dissent flimsily tries to refute this premise by stating:

> ". . . It does not say that we may not take cognizance of the conduct there involved in determining whether an applicant for admission to the Bar of this Court is possessed of good moral character. . . ."

In order to "take cognizance of the conduct" the information had to have been "disclosed." The Bar in this case, violated the law by obtaining "disclosure" of the expunged incident, since the Maryland Code made such disclosure "unlawful." Finally, it is noteworthy that the Dissent relies on *Ex Parte Garland* for the premise that the power to admit attorneys is the exercise of judicial power. The Dissent conveniently declines to point out that *Garland* stands for the premise that the ability to practice law is a "Right". Apply both of these predicates of *Garland*, and even under the Dissent's reasoning, the Applicant would be admitted. The Dissent then closes with the following:

> ". . .An unfaithful bar may easily bring scandal and reproach to the administration of justice and bring the courts themselves into disrepute." [266]

I agree. The big question I have in this case, is where did the Board member get off to ask questions that he clearly knew were improper as indicated by his own statement previously quoted:

> "I am going to ask you this other question. **I don't know whether it is even a fair question,** but I am going to ask it to you."

It is quite clear that the Board member knew what he was doing was wrong.

408 A.2d 1023 (1979)

THE DISSENT SEEMS TO SUGGEST THAT MURDER IS NO WORSE THAN PETTY THEFT

The Applicant was born in 1941. At age 16 he began drinking an addictive cough syrup. In 1958, he was suspended from high school for violating administrative rules. In 1959, he was suspended for being in an unauthorized wing of the school building. He was then suspended again for leaving school grounds without permission. Subsequently, he began using heroin. In 1959, he was arrested for possession of barbituates and given probation. In 1960, he was charged with larceny and the case was dismissed. In 1961, he was arrested for possession of a narcotic. He received a five year suspended sentence and was placed on unsupervised probation. Later that same year, he was arrested again for possession and larceny of narcotics. He was sentenced to a mandatory five year term of imprisonment and served 44 months. In 1966 he was charged with shoplifting cigarettes, and received a three month suspended sentence.

Since 1966, he had not been charged with any crime. Since 1967 he had not used drugs. In 1968 he enrolled in College and by 1970 was working as an Addiction Counselor. He received his undergraduate degree in 1973 and began law school.

In 1978, he was granted an executive pardon for his criminal convictions and ten months later completed law school. He passed the 1979 Bar exam. The Character Committee unanimously recommended in favor of his admission to the State Board of Law Examiners and the Board agreed. The Court also agreed. The Character Committee, Board and Court all agreed this Applicant should be admitted. Consequently, their does not seem to be any case or controversy warranting the litigation. The majority justifies publishing the opinion by stating:

> "The Board's recommendation that the applicant possesses the requisite moral character is entitled to great weight. . . . In considering its recommendation, however, the Court makes its own independent evaluation of the applicant's present moral character based "upon the records made by the Character Committee and the Board." Rule 4c of the Rules Governing Admission . . "

Unlike the Illinois case, where the Court sua sponte and in violation of a valid court rule, wrote an opinion, the Court in this case had a validly enacted rule giving it authority to hear the case. Nevertheless, since the Character Committee, Board and Court all agreed, the opinion seems unnecessary, if it were not for the Dissent. That is the reason for the majority opinion. They are responding to the Dissent.

As a preliminary matter, I note that I would admit the Applicant also. He was pardoned, there was a substantial lapse of time since his last conviction, the offenses while serious were not heinous, and there is substantial evidence of rehabilitation. The Dissent however, does not agree with either myself or the majority. The Dissent states:

> "It is with regret that I once again dissent from the admission of an individual to practice before this Court. . .
>
> Part of the problem apparently is a difference between my colleagues and me as to what constitutes good moral character. **They seem to be of the belief that one can be said to possess good moral character if he has not violated the law lately**. I do not see it that way. . . .
>
> . . . **Do my colleagues propose permitting convicted murderers to become Maryland lawyers since they have not killed anyone lately ?"** [267]

A rather stinging point at first glance. Meritless however, after logical consideration. The analogy between an individual convicted of petty theft or drug abuse, to one convicted of murder is invalid. I would throw the point right back to the Dissent as follows:

Does the Dissent suggest that murder is no worse than petty theft or drug abuse?

Admitting individuals convicted of petty theft over a decade earlier or drug possession a decade earlier, does not in any manner mean that convicted murderers should be admitted. The Dissent's analogy is logically infirm.

.

433 A.2d 1159 (1981)

THE BABY PICTURE PILL CAPER

This is another petty theft Bar admissions case. Maryland definitely developed an affinity for them in the 1970s and 1980s. The Applicant in 1977 obtained a job selling baby pictures, by calling on customers at their homes. In the course of a sales visit, he would request permission to use the bathroom where he would search for, and steal pills from the medicine chest. He was caught, entered a plea of guilty and received a 30 day sentence with 12 months probation. In 1978, he was charged with leaving the scene of a property damage accident. He denied having any problem with drugs or alcohol. Both the Character Committee and the Board of Law Examiners recommended admission. The Court disagreed on the ground that he had not demonstrated complete rehabilitation.

I would not admit this Applicant. He was convicted of a crime less than four years prior to the Court's opinion. According to the Court's opinion he denied having a problem with drugs or alcohol. There has been an insufficient lapse of time since the conviction. If the Applicant avoided criminal conduct for an additional two or three years, I would then admit him. The Character Committee and the Board's decision to admit are inconsistent with their decisions in cases denying certification of Applicants who committed crimes that were far more remote in time than four years. Once again, this demonstrates the arbitrary, irrational and inconsistent nature of the Bar admission process.[268]

434 A.2d 541 (1981)

BIGAMY? THAT'S BIG OF YOU.

The second sentence of the second paragraph of the Court's opinion states as follows in reference to the Applicant:

"He was raised by his grandparents who maintained moral values in circumstances of poverty." [269]

How do they know this? Perhaps, it's true. I really don't know. In any event what do the grandparent's moral values have to do with the Applicant's character and fitness? Great, good, medium, bad or poor, the moral values of the grandparents are irrelevant.

The Applicant was elected president of the student government. While in college, he married one woman and three weeks later married another which constituted bigamy. He was admitted to law school in 1971. While in law school he was elected president of the student bar association and selected by the faculty for a leadership and character award. He was very active in his church, taught Sunday school and worked with the choir. In 1974, using a fictitious name he obtained an Amoco credit card. Subsequently using fictitious names, he obtained other credit cards. In November, 1975 a search warrant was executed at his home and evidence seized. In June, 1976 he pled guilty to mail fraud.

The Board of Bar Examiners recommended admission, but the Court disagreed. Once again, I am unable to understand how the Board could be so inconsistent as to recommend this Applicant for admission who pled guilty to mail fraud, while not recommending the Applicant in *387 A.2d 271 (1978)*, who was charged with stealing a $ 4.99 tape measure and a bottle of rum, when both prosecutions were dismissed.

439 A.2d 1107 (1982)

DON'T BLAME THE APPLICANT FOR THE BAR'S POORLY WRITTEN QUESTIONS

In 1964 at age 17, the Applicant dropped out of the tenth grade and enlisted in the army. He was honorably discharged in 1966. In 1967 while at a bar, he met two men who planned to commit a bank robbery. The Applicant drove the get-away car. He pled guilty to armed robbery and was sentenced to a 10-year prison term. He was incarcerated for six years, during which he was classified as a "management problem." While in prison, he became an avid reader and took courses offered by the University of Georgia. He was released in 1974 and married in 1975. In 1977, he received an undergraduate degree in political science graduating with Honor. In 1977, he applied to the University of Maryland School of Law. In response to a question on his application for admission that requested an account of occupations since high school, he listed "U.S. Federal Prison." He explained his imprisonment and the bank robbery in detail writing:

> ". . .My motives were confused, even then. But more importantly any explanation of motive would be more an excuse than a reason. At my trial I did not deny my guilt, nor do I deny it now; nor do I dismiss criminal action as a natural channel of the poor and oppressed . . .
>
> I spent six and one-half years in prison. I was sent to prison because I robbed a bank, I was kept because I could not conform, or would not. But I read, and as I read living grew in importance. It became an end in itself; not the quantity of life, but its quality. The more I learned of living, the more I wanted to live, the more I wanted that life to be full and involved.
>
> I decided on college in prison . . . . And it was as inevitable that once involved in the Political Science Department that I would turn to law.
>
> . . .The past cannot be mitigated, but a man's life can. If given the opportunity to study, I will do so gladly and with aggression and enthusiasm. Gentlemen, I can achieve. I ask only for the chance."

On his application for admission to the Bar of Maryland, his answers to two questions became points of controversy. Question 5 required an Applicant to list every "residence" where they lived during the last 10 years. He did not list anything for the period during which he was incarcerated. Question 11 inquired:

> "The following is a complete record of all criminal proceedings (including traffic violations other than an occasional parking violation) to which I am or have ever been a party. . . . Nature of . . . Disposition. . . .

Under the heading of "Court" the Applicant placed "U.S. District Ct. for the District of Maryland." He provided no other information. During an admissions interview he stated that he was convicted of a felony and sentenced to 10 years in prison. His admission was not recommended on the ground that he failed to give complete answers. A Hearing was then held. The Committee determined that his answers were adequate and unanimously recommended him to the State Board. The Board then held a Hearing. He indicated that his failure to provide a "residence" for the period of incarceration occurred because he did not consider the federal penitentiary to be a residence. He stated as follows:

". . . **I had no reason to believe that the U.S. Federal Penitentiary was a residence of mine. I never considered it a residence.** I never considered it a place where I lived. I always considered it a place that I was confined. . . ."

Regarding the question that required a record of criminal proceedings, he indicated that his failure to provide detail of the nature and disposition of the proceeding occurred because he was in a hurry to complete the application, rather than to conceal his conviction. He pointed out that when his failure to fully disclose was called to his attention, he provided all of the information. The following exchange is illustrative:

"Q. . . . Did you have any intent whatsoever, **either consciously or unconsciously**, . . . to fail to disclose to the Court of Appeals . . . that you had been convicted of a Federal crime. . . .

A. **I certainly can't answer that question in terms of unconsciously**, but consciously I never intended to omit anything. I intended to disclose everything fully and I saw it as my duty to disclose everything fully.

Q. Are you telling this Board that it never entered your mind in answering either question 5 or question 11 that perhaps not actually answering those may allow the petition to slide by?

A. I don't see how the petition could have slid by."

The Board ultimately recommended admission. The Court agrees. This case presents a unique situation for me. The Character Committee, the Board and the Court all agree this Applicant should be admitted. I would deny admission. I will delineate my reasons shortly, but first address a few aspects, that actually militate in favor of admission. An interesting part of the opinion states as follows:

". . .it appears that the Applicant failed to elaborate the bank robbery in Question 11, providing instead notice which would suffice if a thorough review was made, but not information which would immediately and certainly attract attention. . . ."

That is precisely what good attorneys are supposed to do. Provide information you're required to, but nothing more. That is "good lawyering." "Traditional trial tactics" is a concept approved by numerous Federal Courts of Appeal. The lawyer who completely opens up and provides an opposing party (and yes, the Bar admissions committee is an opposing party) with everything, is not providing good representation. Constitutional questions should be answered correctly. By the same token, when information is not provided because a question is poorly written, the fault lies with the inquirer.

In reference to the "residence" question, I am in full agreement with the Applicant. The Federal Penitentiary is not a "residence." He was correct to leave that section blank. In fact, if he had listed the "Federal Penitentiary" as a "residence," that would not be truthful. What if he tried to make it appear to be a "residence" by writing in the address with no further delineation? He didn't do that. He left it blank. The question was worded poorly and he did the right thing leaving it blank.

His answer to the "criminal proceeding" question is my reason for denying admission. That question asked for a "disposition" and he had a responsibility to disclose that he was "convicted." My conceptual overview of the admissions process is generally very critical of the Bars and Courts. I provide leeway for the Applicants with respect to questions that are unconstitutionally vague, ambiguous, overbroad, discriminatory or phrased poorly. On the issue of criminal convictions however,

I am not so lenient. They must be disclosed. Period. That is the key area where an Applicant is not "candid" if they fail to disclose. That is what society has established as our assessment of "guilt." The conviction. I leave room for rehabilitation, as well as considering the seriousness of a crime, and the time lapsed since conviction. The conviction however, must be disclosed. Period. I do not have a problem with his listing "U.S. District Ct. for the District of Maryland" under the heading "Court." It is in the "Disposition" section where he was not candid and I simply don't buy into the excuse that he was in too much of a hurry to complete the most critical and incriminating aspect of his application.

Were it not for his failure to provide an answer under the "Disposition" heading, I would admit him. There was a sufficient lapse of time since conviction and substantial evidence of rehabilitation. One thing is certain though. This case again demonstrates the inconsistent nature of admission decisions. This Applicant, convicted of armed robbery is recommended for admission while others who committed petty offenses were not. The Dissent makes some interesting points. It states:

> "I had looked forward with pleasurable anticipation to penning my final words as a member of this Court in an opinion considering a much more tranquil subject than is involved here, ... However, such is not to be, for I am so appalled by the action the Court takes today in rolling out a red carpet in order that an unpardoned armed bank robber may tread smoothly on his way to becoming a member of the Bar of this State, that I am impelled to raise a loud voice, albeit an expiring one, in protest. This revulsion to the action of the majority here is not an aberration on my part, for I have consistently expressed similar views in the past . . . it has merely been **intensified to the point of shock** when I contemplate that an applicant who has committed such a dastardly crime as armed robbery is soon to become a member of the Maryland Bar. . . .
>
> **Since the time of Moses**, if not before, "Thou shall not steal" has been understood as one of our basic legal and moral tenets. The majority nevertheless apparently believes that there is no great harm in having a thief or two . . . . With its action, I believe the Court takes a giant leap backward, **abdicating its high responsibility** to assure the public that nothing in the background of an applicant for bar membership has been discovered to reasonably indicate that the prospective attorney might not be possessed of the basic qualities of honor . . . .
>
> The **right** to membership in the legal profession is not one that adheres to every citizen as does the right to engage in an ordinary trade or business. It is a **unique privilege** extended only to those who demonstrate that they have ascended a special plateau . . . . **Moreover, once admitted to the bar, an attorney is subject to far less intense official scrutiny concerning his character than that which occurs during the application process. . . .**
> **. . .**
> . . . There must be offenses so serious that the applicant committing them cannot again satisfy the court that he has become trustworthy; if there are such crimes, this is surely one of them. . . . "total frankness throughout the application procedures is . . . a sine qua non for admission to the Bar.". . . "

Where to begin with this troubled Dissent? First off, the phrase, "Since the time of Moses" suggests a blatantly unconstitutional ground for judging a Bar admission in violation of the First Amendment. It was obviously written by the same Justice that I previously criticized for making the same statement in another case. The Dissent makes this statement believing it will strongly illustrate an important point. However, it simply makes the Dissent look ridiculous.

It is interesting that the Dissent believes the Court is "abdicating its high responsibility." That's a pretty incredible statement which I will let stand on its own. He characterizes the ability to practice

law as a "right to membership" and then as a "unique privilege." "Right" and "Privilege" are adverse to each other. The dichotomy between "Right" and "Privilege" is in many respects determinative of the heart and soul of the admissions process. The ability to practice law cannot logically be both. I also disagree with his assertion that:

> "total frankness throughout the application procedures is . . . a sine qua non for admission to the Bar.". .

"Total frankness" is only the "sine qua non" to the extent the questions asked are constitutional. One has no legal responsibility to frankly answer unconstitutional questions. The Dissent makes the following point which exposes the biggest problem with the admissions process:

> **"Moreover, once admitted to the bar, an attorney is subject to far less intense official scrutiny concerning his character than that which occurs during the application process. . . ".**

The attorney is purportedly subject to the ethical rules of conduct and therefore should not be subject to "far less official scrutiny" than the Nonattorney Bar Applicant. By the same token, attorneys should not be disciplined just because they don't play the "get along with the other lawyers game." In closing, the Dissent makes the following characterization about the Bar:

> ". . . a bar which, from the mid-seventeenth century, has enjoyed such an illustrious stature." [270]

I disagree. State Bars and lawyers have not enjoyed an illustrious stature. Throughout history they have been consistently disdained, scorned and justifiably ridiculed by law abiding members of society. The Dissent lacked candor by asserting otherwise.

462 A.2d 1198 (1983)

DID YOU GUYS GET PAID FOR WRITING AN OPINION THAT SAYS NOTHING?

The Court's opinion is very brief. The Applicant was convicted of attempted armed robbery and sent to prison. The date of the conviction is not in the Court's opinion. Both the Character Committee and the Board of Law Examiners recommended admission. The Court disagreed and denied admission. The entire opinion is about six sentences long. It notes that one Judge would have admitted the Applicant. I am unable to make a determination whether he should be admitted, since the opinion is so brief and does not even include the date of conviction. I present this case to make only one point. The Character Committee, the Board and one Judge on the Court felt this Applicant should be admitted. In view of such, it is inexcusable that the Court published an opinion that did not include at least the bare essential facts. Clearly, it was not a slam dunk case, since numerous purportedly responsible State Bar officials, Committee members and a Judge believed he should be admitted. [271]

499 A.2d 935 (1985)

I ASSUME YOU GOT PAID FOR THE LAST OPINION THAT SAID NOTHING, SINCE YOU WROTE ANOTHER

This is another short opinion. All you can tell from reading it is that the Character Committee favorably recommended the Applicant and the Board of Law Examiners then made an unfavorable recommendation. The Court rules in favor of admission. I have no idea what issues were involved. The Court makes one brief comment that is characteristic of Bar admission cases when it states:

> ". . . having considered the fact that the burden rests at all times upon the applicant to prove her good moral character . . ." [272]

The question I present for reflection is this:

> How can the burden logically rest at all times upon the applicant, if the Bar admissions process is not a product of the grace and favor of the State?

Placing the burden on the Applicant substantively results in treating the ability to practice law as a "Privilege," rather than a "Right," regardless of the fact that it may be classified in form as "Right."

511 A.2d 516 (1986)

BAD, BAD, LITTLE GRIEVANCE COMMISSION. SHOW SOME REMORSE AND REHABILITATION.

The Attorney Respondent in this disciplinary proceeding was admitted to the Maryland Bar in 1981. Bar counsel instituted disciplinary proceedings on the frivolous ground that she failed to properly answer Question 17 on her admissions application which read:

> **"Are there any unfavorable incidents in your life**, whether at school, college, law school, business or otherwise, **which may have a bearing upon your character** or fitness to practice law, not called for by the questions contained in this questionnaire or disclosed in your answers?" [273]

I have reviewed numerous cases herein, that address this type of ridiculous question. It is blatantly unconstitutional. No disciplinary proceeding pertaining to such a question is legitimate. When Legislatures draft laws that even faintly approach such vagueness they are declared unconstitutional. The irrational Bars however persist in using these questions, as if they are above the law. Their mere attempt to use such questions challenges the legitimacy of the Bar. They are doing something they <u>know</u> is unconstitutional. Briefly stated again, two reasons for the question's unconstitutionality are:

1. "Unfavorable incidents" - The term "unfavorable" will mean many different things to many different people. Suffers from vagueness, ambiguity and overbreadth.

   Example : While I am certain the Bar's use of this question is an "unfavorable incident" that reflects negatively on their character. I assume they disagree with me.

2. There is no time frame limitation on the question's scope. The question therefore irrationally mandates disclosure of "unfavorable incidents" that occurred when one was a child or even a baby.

In this particular case, the Respondent properly answered "no" to the question. At age 18, she was given probation for possession of heroin **and the charge was expunged**. The Attorney Grievance Commission nevertheless irrationally asserted that her failure to disclose the incident was a "material false statement."

Their false assertion raises an interesting issue. Most citizens would view an "expungement" as bearing <u>*favorably*</u> upon an individual who had been convicted of a crime. Thus, it is disclosure of the incident, rather than nondisclosure that would have constituted a false answer. The question inquired about "unfavorable incidents," rather than "favorable." The expungement is favorable.

Question 11 made inquiry about all criminal proceedings in which the Applicant was a party, but contained a caveat to <u>not report</u> any court proceeding the record of which was expunged. The Grievance Commission here was obviously playing a diabolically deceptive game. They were trying to penalize the Respondent for nondisclosure <u>when the application itself expressly mandated nondisclosure.</u>

That's crap. Bad, bad, grievance commission! Show some remorse and rehabilitation. The Court rules in favor of the Good Respondent and against the Bad Grievance Commission.

545 A.2d 7 (1988)

THE CHARACTER COMMITTEE SCHMUCKOs!

Here's another beauty !! The admissions process at its best, (worst?). The Applicant applied to the Bar in 1984. In 1982, he had filed for bankruptcy and the Bankruptcy Judge in a memorandum wrote about him:

> "appears to have a good grasp of accomplishing delay through bankruptcy filings."

The Character Committee assigned an attorney to interview the Applicant. The attorney informed the Committee that he had a conflict of interest because a partner in his law firm represented a client suing the Applicant. The Applicant later appeared before a Character Committee panel. **The same attorney who had informed the Committee he could not interview the Applicant, because he had a conflict of interest, was a member of the panel.** The Applicant's counsel asserted that the attorney should remove himself, but the attorney refused. The **Chairman of the Committee irrationally ruled that he would not be disqualified.** The character issues were as follows:

1. An arrest that was in the process of being expunged for stopping payment on a check.
2. The civil suit where the opposing party was represented by a law firm that employed the attorney who was on the Character Committee.
3. The bankruptcy filing in 1982
4. A deposition given by the Applicant regarding an automobile accident, in which he purportedly lied in describing his injuries.

The Applicant presented evidence demonstrating that his arrest had been expunged. In regard to the bankruptcy, he argued that he was acting under advice of counsel. He further demonstrated that the civil suit involving the attorney in question had been settled and that it never amounted to more than mere allegations.

The Character Committee did not recommend admission. In *439 A.2d 1107 (1982)*, the Committee recommended admission of an Applicant convicted of armed robbery and in earlier cases for Applicants convicted of Theft. Looks pretty inconsistent and arbitrary. Not exactly a model application of objective standards applied evenly and fairly. Rather instead, subjective decision-making predicated on the grace and favor of the Committee. Admission to the Bar being kind of like a "present" that is awarded by the State.

The Court which admitted felons and convicts (some cases in which I note, I agreed with their decision), denies admission to this Applicant. An Applicant never convicted of a crime, with one arrest that was expunged, and who appeared before a Character Committee that included an attorney panel member whose firm had represented an opposing litigant. Previously, that attorney had even notified the Committee he could not interview the Applicant because of a conflict of interest. He apparently saw no reason however, for excluding himself from the final decision-making process. The Court writes irrationally as follows regarding the attorney who refused to disqualify himself:

> **"We find that . . . should not have been named as a member of the Character Committee panel charged with investigating . . . application for admission** . . . . As we see it, this conclusion is palpably clear in light of the fact that . . . is a partner in a small law firm which had filed a lawsuit on behalf of a client against . . . . This lawsuit was ultimately a topic of the Character Committee's inquiry.
>
> **. . .**

> **Clearly, under ordinary circumstances, we would be constrained to remand this matter for a new Character Committee hearing. However, in this case, the Board has conducted what is in effect a de novo hearing and disregarded the . . . issue . . . as having any impact on its findings and/or conclusions. We are, therefore, satisfied that the process afforded** . . . by the Board was sufficient to ensure . . . that an unbiased record would be submitted to this Court for its review.
>
> **. . .**
>
> We are also concerned with the comments made by Judge . . . of the Bankruptcy Court that . . . improperly utilized that court to delay foreclosure proceedings. Again, the root of the problem is . . . inability to maintain financial stability. . . ." [274]

In light of the Court's prior admission of convicted felons, constitutional standards required admission of this Applicant. It is incredible to me that the Court would concede the attorney in question should not have been on the Committee, but still affirm their decision. It's similar to concluding that a trial judge should have disqualified himself, and then proceeding to affirm his decision. Considering the Character Committee's failure to disqualify the attorney and the Court's blatant whitewash, this Applicant got screwed up the butt.

The Character Committee lacked a requisite trait to make a fair and constitutional decision. Character.

558 A.2d 378 (1989)

JUDICIAL CHICKENS

A brief opinion, apparently because the Applicant hit the heart and soul of the admissions process. Minimal facts are stated in the opinion other than that the Character Committee, the Board of Law Examiners and the Court all believed he lacked the requisite character. It does state however the following points which appear to demonstrate the reason for denial:

> "The Court having also considered various constitutional arguments presented by the applicant to justify his admission to the Bar, **namely that the holdings of the Board and the Committee constituted a denial of his constitutional right to equal protection, due process, privileges and liberties**, and **his right to have the Court give full faith and credit to a "Certification of Relief from Disability" granted to him by the State of New York**, absolving him from all civil liabilities and disabilities, resulting from a conviction for armed robbery in that State . . ." [275]

The sad part about this case, is that the Court lacked the strength in character and fortitude to even discuss the constitutional arguments. It's obvious they wanted to hide them. I have no idea whether I would admit this Applicant, since the Court chickened out from presenting the relevant facts.

649 A.2d 599 (1994)

CHICK, CHICK, CHICKETY

The Applicant withdrew his original application and then filed a second application in 1988. The Board issued a Report recommending against admission. In 1994 (six years later), the Court conducted a Hearing, where the Applicant indicated he no longer intended to take the Maryland Bar exam. He indicated his purpose for applying was to "clear his record." The Court determined that it would be a meaningless exercise to rule on the application since the Applicant had no intention of becoming a member of the Bar. To do so, was in effect asking the Court, it stated:

"to render an advisory opinion, a long forbidden practice in this State." [276]

I disagree with the Court. The negative character decision rendered by the Board, constitutes an actionable injury to the Applicant since it would need to be disclosed on future Bar applications to other States. The Court was just looking for a way to bail out of doing its' job.

663 A.2d 1309 (1995)

APPLICANTS TO THE BAR MUST PAY THEIR DEBTS TIMELY,
BUT LICENSED ATTORNEYS DO NOT HAVE TO

The Applicant became a member of the California Bar in 1993. On his Maryland application, he disclosed that in 1986, he was convicted of failure to file sales tax returns arising from operation of a restaurant. He also disclosed that he failed to remit payroll withholding taxes in connection with the same restaurant. **In 1992, he served as an unpaid intern in the Public Defender's Office, and performed work without pay for other legal organizations. The Board concluded that his failure to work for pay was to avoid garnishment.** In my opinion, that's a pretty dismal outlook towards volunteer work. After a Hearing in 1994, the Character Committee recommended admission. The Committee concluded he accepted responsibility for the non-payment of taxes. It further found he had served the required time in jail and fully paid the taxes owed. The State Board of Law Examiners however, recommended that he not be admitted. It found he did not appreciate the seriousness of his activities and that there were troubling issues of candor and credibility raised by his testimony. It found he made evasive statements. The Court agreed with the Board and found his testimony before the Character Committee and Board was inconsistent. The opinion states:

> "Absolute candor is a requisite for admission to the Bar of this State. . . .
>
> While there is no litmus test by which to determine whether an applicant for admission to the Bar possesses good moral character, we have said that no moral character qualification for Bar membership is more important than truthfulness and candor.
> . . .
> The conduct of an applicant in satisfying his or her financial obligations and exhibiting financial responsibility is an important factor in assessing good moral character. . . .
> . . .
> **. . . Despite his sizeable I.R.S. debt upon entering law school, the applicant financed his education mainly through student loans and declined to seek any employment for pay while in school. . . .**
> . . .
> **. . .Likewise, his commendable performance of volunteer legal services has also impacted adversely on his ability to satisfy his financial obligations. . . ."** [277]

The Court treads on most imprudent ground. Essentially, it criticizes the Applicant for performing volunteer legal services. I can not foresee the Court gaining public respect with such an outlandish stance. It also holds the fact against the Applicant that he financed his law school education with student loans, when he had a sizeable IRS debt. Perhaps, the Justices would be better off writing their Congressman if not satisfied with Federal criteria for obtaining student loans.

Most importantly, in the absence of the Bar and Court regularly reviewing the debt paying records of licensed attorneys in the State of Maryland, it is ridiculously hypocritical to impute such a requirement upon Bar Applicants. Stated succinctly, there is no legal requirement in America that a citizen pay their debts on time. For those citizens, who do not, creditors have the right to sue, but that's it. The Court is inching its' way in this case towards acceptance of Debtor prisons, a concept long ago supposedly determined to be barbaric. With the operative term being, <u>supposedly</u>.

533 A.2d 278 (1987)

The Bars won't discipline attorneys for failing to pay debts, but they will discipline attorneys who purportedly made a "material false statement" or "failed to disclose a material fact" when applying to the Bar. The Respondent attorney was admitted to the Pennsylvania Bar in 1974 and the Maryland Bar in 1981. The Maryland application was submitted pursuant to Rule 14 which provided for admission of attorneys licensed in other States without taking the Bar exam. The Rule required the Out-of-State attorney to represent:

> "(iii) that for at least five of the seven years immediately preceding the filing of his petition he has been regularly engaged . . . as a practitioner of law . . . ."

The Respondent attorney represented that he met the rule's requirement and had been a "SOLE PRACTITIONER." In answering Question 12 regarding employment held within the last five years, the Respondent answered "NON APPLICABLE." In fact, during the period, he was employed as a full time claims adjuster in Baltimore, Maryland. The Judge determined that the Respondent deliberately made false and material misstatements in answer to the questions. The Respondent did not dispute the underlying facts or the materiality of the withheld information. Rather instead, his argument was that he did not deliberately fail to disclose the facts. The Court determines that it could reasonably be inferred that he deliberately concealed his full-time employment so the board would be unaware it was his principal livelihood, rather than the practice of law. The Court Orders disbarment.

I present this case to address the issue of materiality, even though the Respondent failed to dispute the materiality of the withheld information. That was a major strategic error on his part. The Court addresses materiality, but defines the term incorrectly, stating:

> "**A material omission, . . . is "one that has the effect of inhibiting the efforts of the bar to determine an applicant's fitness to practice law**. . . . For present purposes, we may rephrase the . . . language to define a material omission as "one that has the effect of inhibiting the efforts of the board to determine whether an applicant's practice of law has been extensive enough to justify his enjoyment of the Rule 14 privilege. . . .
>
> Even more to the point, had the board been informed of (and checked into) . . . employment at . . . during the critical 1972-1980 time frame, the Rule 14 application would undoubtedly have been rejected. . . . He admitted that in his Pennsylvania practice he handled but "ten to fifteen cases a year" and "worked about fifteen hours a week . . . on the practice."

The Court's definition of materiality is incorrect. It mistakenly focuses on whether the omitted information has the effect of "inhibiting the efforts" of the bar to determine fitness. That is a meaningless standard. Anything could subjectively be asserted as "inhibiting the efforts." What constitutes "inhibiting?" The term itself is ambiguous. It means different things to different people. The proper definition of "materiality" is whether the missing information would have affected **the ultimate decision** and was **intentionally not disclosed.** In applying the materiality concept, the Court states:

> **"Even more to the point**, had the board been informed . . . the Rule 14 application **would undoubtedly have been rejected."** [278]

Assuming the application would indeed have been rejected, the Court's application of materiality is proper, notwithstanding the fact that it defined the term incorrectly. **The Court uses the phrase, "Even more to the point" because it knows that is the only important point.**

Versuslaw 2001.MD.0000105; April 10, 2001, Misc. Docket No. 8 (2001)

THE LOOPHOLE

This case is hilarious. Follow the facts closely. The Applicant was a member of the District of Columbia Bar and filed an application for admission to the Maryland Bar as an out-of-state practicing attorney. By applying as an out-of-state attorney he qualified to take an attorney examination, which is typically easier than that given to initial Applicants. He passed the attorney exam and was scheduled to be admitted to the Maryland Bar on 12/12/85. On 11/27/85, in accordance with standard procedure, he filed an oath reaffirming information on the character questionnaire previously submitted. Two days before being admitted on 12/10/85 (14 days after reaffirming his character questionnaire), he informed the Maryland Board that he had become the subject of disciplinary proceedings in the District of Columbia. Apparently, this information came to his attention between 11/27/85 and 12/10/85. On 12/11/85, the Maryland Board noted that he would not be admitted and wanted to investigate the District of Columbia grievance complaint pending against him. He then declined to pursue the Maryland Bar admission further, and was not admitted at that time.

Six years later, in 1991, he was Disbarred by the District of Columbia Court of Appeals. Seven years after that, in 1998, he simply contacted the Maryland Bar Board to inquire about the date he had successfully passed the attorneys' examination. He then simply asked about the procedures for admission, as if nothing had ever transpired 13 years earlier in 1985. He was told that documents would be forwarded to him for completion and subsequently received those documents from the Maryland Clerk of the Court of Appeals, along with a letter approving his petition for admission.

It was absolutely unbelievable. He had simply called them on the phone and never mentioned his Disbarrment or the 1985 investigation. The Maryland Court of Appeals just simply went ahead and approved his admission. Two and a half years after that, in September, 2000 the Maryland Bar Board became aware for the very first time that he had been Disbarred in the District of Columbia in 1991. They then moved to revoke his law license on the ground that he was admitted in error.

He was ultimately Disbarred in Maryland, but the legitimacy of the Maryland Disbarrment was in my view, highly questionable. He made an exceptionally good argument to the Court. He noted that he had never lied about being Disbarred in the District of Columbia, because quite simply he was never asked about it. Additionally, the express language of the Maryland rule providing for admission of out-of-state attorneys simply did not contain any provisions requiring the updating of a Bar application. He further noted that the Maryland Bar was unable to point to any rule in existence that prevented a Disbarred lawyer, who had passed the attorney examination and met the requirements for admission of out-state-attorneys prior to Disbarrment, from being admitted. Then finally, he strongly emphasized that he had merely relied on the Clerk of the Maryland Court of Appeals who had informed him of the procedure for admission.

There is little doubt that in considering this case, one must inescapably reach the conclusion that the Maryland rules certainly should have contained a provision to prevent a debacle like this from occurring. The concept that a Disbarred attorney could be admitted pursuant to admission rules for licensed out-of-state attorneys is undoubtedly ludicrous. By the same token however, that is irrefutably what the Maryland rules as written provided for. The bottom line is that the Respondent in this case was in fact, correct. The rules were written poorly, he had found the loophole, and he had taken advantage of it. The rule certainly should be amended, but the Court lost a tremendous amount of credibility by violating the rule in order to secure this man's Disbarrment. The Court's opinion even states:

> "The respondent has repeatedly stated that he was under no obligation, so far as the Rules prescribed, to update his application. As to whether the rules prescribed such an obligation, he may be right." [279]

MASSACHUSETTS

IN THE MATTER OF ALGER HISS, 333 N.E. 429 (1975)

Alger Hiss. Now there's a name etched into the annals of American history. In 1950, Alger Hiss was convicted of two counts of perjury for testifying that he had never turned over documents of the U.S. State Department to Whittaker Chambers. Chambers was the chief accuser of Hiss during Hearings held prior to a grand jury investigation by the Committee on Un-American Activities of the House of Representatives. Following affirmance of Hiss' conviction, the Supreme Court of Massachusetts disbarred him. Twenty-four years later in 1974, at age 69 Hiss filed a petition for reinstatement. Three fundamental questions were considered by the Court:

1. Were the crimes of which Hiss was convicted and for which he was disbarred so serious in nature that he is forever precluded from seeking reinstatement?

2. Are statements of repentance and recognition of guilt necessary prerequisites for reinstatement?

3. Has Hiss demonstrated his fitness to practice law?

The Court decides in Hiss' favor with respect to (1) above stating:

> ". . . **we cannot now say that any offense is so grave** that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs, drawn from conduct and social interactions, that he has achieved a "present fitness" . . ."

The Court then describes what it considers to be the purpose of disbarment stating:

> ". . . Its purpose is to exclude from the office of an attorney in the courts, for the preservation of **the purity of the courts** and the protection of the public . . . The position of the Bar Counsel presupposes that certain disbarred attorneys, guilty of particularly heinous offenses against the judicial system, are incapable of meaningful reform which would qualify them to be attorneys . . . **Such a harsh, unforgiving position is foreign to our system of reasonable, merciful justice.** It denies any potentiality for reform of character. A fundamental precept of our system (particularly our correctional system) is that men can be rehabilitated. . ."

The Court then decides in Hiss' favor with respect to (2) above stating:

> ". . . **because Hiss continues to insist on his innocence, the board recommended that his petition for reinstatement be denied. Neither the controlling case law nor the legal standard for reinstatement to the bar requires that one who petitions for reinstatement must proclaim his repentance and affirm his adjudicated guilty**. . . . The legal standard for reinstatement to the bar is set forth in S.J.C. Rule 4:01 . . . . **There is no mention of repentance as a prerequisite for admission**. . . . The continued assertion of innocence in the face of a prior conviction does not, as might be argued, constitute conclusive proof of lack of the necessary moral character to merit reinstatement. . . . We also take cognizance of Hiss' argument that miscarriages of justice are possible. **Basically his underlying theory is that innocent men**

conceivably could be convicted, that a contrary view would place a mantle of absolute and inviolate perfection on our system of justice, and that this is an attribute that cannot be claimed for any human institution or activity . . . . Thus, we cannot say that every person who, under oath, protests his innocence after conviction and refuses to repent is committing perjury.

Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit. For him, a rule requiring admission of guilt and repentance creates a cruel quandary, he may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as a perjury to prove his worthiness to practice law. . . . "Circumstances may be made to bring innocence under the penalties of the law. . . .

Accordingly, we refuse to disqualify a petitioner for reinstatement solely because he continues to protest his innocence of the crime of which he was convicted. . . ." [280]

The Court proceeds to determine that Hiss demonstrated he is currently of good present moral character and he is reinstated. Overall, it is an excellent opinion. I present it for its' relation to an initial bar admission. Certainly, a licensed attorney should be held to a higher standard of moral character than a Nonattorney. Hiss' actions (whether guilty or innocent) took place during a time when he was a licensed attorney. If during reinstatement proceedings, innocence may be asserted (as this opinion mandates) with respect to convictions that occurred while a licensed attorney; logic mandates that one be allowed to assert innocence in an initial bar admission proceeding with respect to convictions when a person is a Nonattorney.

The rule would work well and can be outlined as follows. Convictions must be disclosed on the Bar application. Incidents that do not result in a conviction (such as mere arrests or civil litigation, etc.) need not be disclosed. Further inquiry may be made into the circumstances of convictions, including whether the Applicant is sufficiently rehabilitated and depending upon the circumstances of the case, appropriate weight given to assertions of innocence.

This proposed rule differs immensely from that currently applied by most Bars. Currently, most Bars during initial admissions proceedings treat continued assertions of innocence with respect to convictions as constituting "lying." In other words, when the Applicant discloses the conviction, but says he was innocent and wrongly convicted. The admissions committee not only holds the conviction against him, but also the continued assertion of innocence. That is unjust.

To make matters worse, although the Bars hold that convictions may not be contested and penalize Applicants for assertions of innocence, they inconsistently adopt a contradicting standard for mere arrests not resulting in convictions. In such circumstances, the Bars ignore the constitutional premise that one is innocent until proven guilty. They independently review the facts to determine if the Applicant was guilty, notwithstanding his exoneration. What you are left with from the current system can be summarized as follows:

1. If you are convicted of a crime, continued assertions of innocence are deemed to constitute lying. Assertions of innocence, introducing evidence of prosecutorial misconduct, police misconduct, or new evidence penalizes the Applicant.

2. If you are not convicted of a crime, you may still be found guilty of the offense by the Bar admissions Committee.

It seems to me that either the Bars need to respect the Judgments of Courts, or alternatively not respect them (which obviously would be wrong). To respect convictions, but not acquittals and dismissals is inequitable. The Bars should either have faith in the courts in both instances, or not have faith in both instances. The way they do it currently, is nothing more than a backstreet city shell game. Presumably, near a Bar.

392 N.E.2D 533 (1979)

The Applicant took the 1977 Bar exam. A score of 50 was the passing grade, but her score was 49.5. The essay portion of the exam was re-graded. She then appeared on November 17, 1977 for an "informal" interview. As a result of that interview, a formal Hearing on her character was scheduled. The Court's opinion actually phrases it as follows:

> "the Bar Examiners decided to grant the applicant a formal hearing"

The term "grant" is misleading. It correlates to the term "Privilege." It creates the false appearance that the Board is doing her favor. They're not recognizing her "Right" to a Hearing, but rather instead they're "granting" a Hearing. The mere use of such a disingenuous word smells bad to me. The opinion then states in reference to the Hearing:

> ". . . witnesses testified to the conduct and demeanor of the applicant in and around the courthouses in several counties. Thereafter, on May 13, 1978, the Bar Examiners held a further hearing as to complaints filed by the applicant with the Board of Bar Overseers against three attorneys who testified at the February 24 hearing. At the hearing, the applicant stated that she was contemplating the filing of further complaints.
>
> Subsequently, the Bar Examiners reported to this court that the applicant is not qualified for admission as an attorney. . . . The Bar Examiners thereafter found, inter alia, that the applicant has used judicial processes in a way inconsistent with the standard to be expected of a lawyer. . . .
>
> We accept the applicant's premise that the license to practice law may not be withheld arbitrarily or discriminatorily. Nevertheless, we have reviewed the transcripts of all proceedings, and we think that the Bar Examiners' conclusions were clearly warranted. . . ." [281]

The opinion has a stench about it. She first gets the essay exam re-graded. This probably annoyed the Board, so they scheduled an interview. One thing leads to another. The Board doesn't have squat on the Applicant, so they deny admission based on nebulous reasons such as "demeanor" and "used judicial processes in a way inconsistent with the standard expected." The Court agrees that the license to practice law may not be withheld arbitrarily, and then proceeds to do precisely that. Hypocrisy under the guise of legitimacy. Concede the rule, but then apply it in a manner violating the rule's express mandate.

661 N.E.2d 84 (1996)

A "RIGHT," "NATURAL RIGHT," "INHERENT RIGHT," "CONSTITUTIONAL RIGHT," "PRIVILEGE," "RIGHT IN THE NATURE OF A PRIVILEGE," "PECULIAR PRIVILEGE?" HOW ABOUT JUST OWNING UP TO THE FACT THAT YOU REALLY DON'T KNOW WHAT IT IS?

The Applicant, a son of immigrants was born in 1947. He attended Bowdoin College from 1965-1969 and was a member of Phi Beta Kappa. He graduated summa cum laude. From 1971-1972 he attended Harvard University as a graduate student, where he began smoking marijuana. Over a period of six years, he organized and led a large-scale international drug smuggling operation using several aliases. He was indicted in 1983 and convicted in 1988 of several drug felonies. He received a suspended sentence with probation for five years. Seven years lapsed between his conviction and the Court's opinion. In 1991, while still on probation, he received permission from the Federal court to apply to law school. While in law school he was a member of the Law Review and worked for legal aid. He applied to the Massachusetts Bar in 1994 and passed the exam. During this time frame he clerked for the Supreme Judicial Court of Maine.

He was then, as the Massachusetts' opinion states, "invited" to appear at an oral interview. What a great invitation for one to receive! A very "misleading" term. (Please, take me off the invitation list). More truthfully stated, the Court should have said, "he was required to attend an interview to have any chance at all for admission."

The Applicant's primary argument was that he was rehabilitated. The Board agreed and certified his character on January 6, 1995. Six months later on June 30, 1995 a single Justice of the Supreme Court reported the case to the full court for a determination and the Court disagreed with the Board's certification. This case is presented for its' extensive discussion of the standards to be applied for convicted felons in original bar admission proceedings and their relation to the Hiss case. Remember, the Hiss case was a reinstatement proceeding, while this case is an initial admission proceeding. Both involved individuals convicted of serious felonies. Hiss was admitted, this Applicant is not. Applicable portions of the opinion read as follows:

> ". . . The rules governing original admissions to the bar, promulgated prior to development of the rules governing reinstatement, have no reference to the integrity of the bar or the public interest . . . . These directives set out a procedural scheme rather than substantive guidelines for bar admissions. Thus, it is appropriate, despite the lack of specific directive, to consider the public perception of and confidence in the bar when determining the fitness of original applicants to practice law. . . .
>
> . . . **Authorities differ on whether those seeking to enter the profession have a lesser burden in showing moral fitness than those seeking reinstatement after disbarment**. . . . **This court, however, has suggested that the standards for original admission and readmission after disbarment should be the same**. . . . The Hiss factors allow the court to balance circumstances surrounding the misconduct against the action the applicant has taken to show his rehabilitation . . . . We thus apply the Hiss factors . . . ."

The Court holds that reinstatements and original admissions are subject to the same standard. Reinstatements concern acts committed by individuals who were once licensed attorneys. Original admissions however, typically concern acts committed by Nonattorneys. The Courts almost unanimously hold that in a disbarment proceeding the burden of demonstrating a lack of good moral character is on the Bar. However, in an admission proceeding the burden of demonstrating good moral character is on the Applicant. That is irrational. Why place the burden of proof on a Nonattorney who

is not bound by the ethical rules of conduct, while the licensed attorney who is bound by ethical rules is relieved of that burden? Since the ability to engage in the practice of law is constitutionally a "Right" in accordance with *Ex Parte Garland*, the burden of proof in an original admission proceeding should rest with the Bar, not the Applicant. Even if one disagrees on this point, it can not be rationally argued that it makes sense to provide a lenient moral character burden for the licensed attorney, compared to the Nonattorney. The Court later addresses the issue of whether the ability to practice to law is a "Right." It states:

> "The **right to practise law** is not one of the **inherent rights** of every citizen, as is the right to carry on an ordinary trade or business. It is a **peculiar privilege** granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character. All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and separate the fit from the unfit." [282]

In other cases it has been discussed, whether the ability to practice law was a "right," a "natural right," a "constitutional right," a "privilege or a "right in the nature of a privilege." We now have some additional entries in this case. An "inherent right," and a "peculiar privilege."

The Courts clearly suffer from great confusion in this area and require enlightenment. It's a "Right." Period. That's what the U.S. Supreme Court said in "*Ex Parte Garland*" over 125 years ago and the case has never been overturned.

Otherwise, the Courts should just say what they really mean. It's a "smelly privilege," to be granted upon the grace and favor of the state. A "present" so to speak. A gift that the State may wrap up with a nice, neat bow to give those possessing the demeanor, attitude and ideological beliefs that are in accordance with the economic interests of the legal profession and fortification of State Bar power.

In rendering my own conclusion regarding this Applicant, I would admit him. The offenses are serious but he presented substantial evidence of rehabilitation and seven years lapsed between the date of conviction and the Court's opinion. If during that time however, he had been convicted of any other crime, even a misdemeanor, I would deny admission.

It is a close case. It was also decided under the incorrect rule of law. The ability to engage in the practice of law is not a "peculiar privilege." It's a fundamental constitutional right.

MICHIGAN

285 N.W.2d 277 (1979)

HOW ABOUT A LITTLE 69?

The State Bar instituted a disciplinary action against a Judge. He was reprimanded for allegedly answering inaccurately in his admission application that he had not been a party to a divorce proceeding. The question's scope was limited to divorce proceedings in which one was charged with "immorality" or "other dishonorable conduct." Before addressing the case, the question itself is a blatant First Amendment violation. A person's divorce is not the State Bar's business. This case appears motivated by political interests of the Bar. At a Hearing by the Supreme Court, the State Bar representative argued that the Bar's Hearing panel should have revoked his license to practice law for inaccurate answers concerning his divorces, rather than just reprimanding him. The question on the Bar application read:

> "Have you ever been:
>
> "a. **A party to divorce** or support proceedings or to any legal action or proceeding, civil or criminal, **in which you were charged with fraud, embezzlement, immorality, or other dishonorable conduct**?"

The question contains important limitations. It does not simply inquire whether one has ever been a party to divorce or support proceedings. Rather instead, it limits itself to divorce or support proceedings where the Applicant was charged with:

> ". . . fraud, embezzlement, immorality, or other dishonorable conduct . . . ."

This case actually had its' origin prior to institution of the Bar disciplinary action. The origin of this case confirms its' political nature and how the Bar attempted to promote its' own political interests by issuing what in constitutional terms must be viewed as a frivolous reprimand. While he was a Judge, the Judicial Tenure Commission filed a complaint alleging judicial misconduct. That complaint made numerous allegations including one which is somewhat remarkable. The Commission felt the Judge engaged in misconduct because he:

> **"9. Brags of his sexual prowess openly."**

Judges of America, you now have a guideline. If you brag of your sexual prowess do so discreetly. If you lack sexual prowess and can't get it up, you're on safe ground. Start telling the other Judges that you're a great lover though, and you'll probably be hearing from the Judicial Commission. Ultimately, the Commission recommended that he be removed from office. The State Supreme Court suspended him from judicial office for five years. The State Bar Grievance Board then filed its own complaint against him. Obviously, a prime example of "get him while he's down."

In reference to the divorce proceeding question, as an Applicant he had answered it in the negative. In fact however, he was a defendant in two divorce proceedings in which he allegedly engaged in sexual misconduct and one divorce proceeding in which he was accused of non-support. The question's scope remember, was limited to those proceedings in which the Applicant was "**charged**" with:

> ". . . fraud, embezzlement, immorality, or other dishonorable conduct . . . ."

Based on the facts as set forth in the Court's opinion, I believe the Applicant answered the question correctly. There are irrefutably no facts stated in the Court's opinion even suggesting that he was "charged" with fraud or embezzlement. The focus therefore is primarily on the term "immorality," the phrase "other dishonorable conduct, and the term "charged." Typically only prosecutors can "charge" an individual with violating the law. Litigants in civil proceedings can make "allegations," but they can't "charge" the opposing party. The above facts concerning his divorce proceedings do not include evidence of a formal "charge." Rather instead, it appears there were mere allegations.

Addressing the nature of the allegations, many difficulties are evident. What constitutes "immorality or other dishonorable conduct?" Let's back up even further though. Before addressing the vagueness of the terms "immorality" and "other dishonorable conduct," what constitutes "sexual misconduct?" Is sexual misconduct immoral and dishonorable if your spouse is also engaging in it? The opinion does not provide any facts with respect to the type of alleged "sexual misconduct" or whether there were mutual allegations of "sexual misconduct" being committed by his former spouse. Maybe he wasn't even cheating on his spouse, or vice versa.

Does engaging in what is known as, "69" constitute "sexual misconduct?" Most people including myself would probably give that a strong "No" vote, but others may disagree. How about a blowjob? Former President Bill Clinton probably feels it doesn't. Does the answer depend on whether the blowjob is given by a beautiful topless dancer ? Make mine one with large, shapely breasts and a great smile. Does the answer depend on whether you ejaculate? While I haven't researched these issues quite as thoroughly as I'd like, it's my guess that many religious Puritans would assert a mere blowjob constitutes "sexual misconduct," regardless of who gives it. Threesomes? Foursomes? Sex on the kitchen table? Sex on the beach? Sex in public view? It is easy to see that the term "sexual misconduct" means very different things to many different people. This being the case, it is irrefutable that the Bar is trying to impute vague qualitative characteristics ("immorality and other dishonorable conduct") upon an alleged behavior ("sexual misconduct") that is itself vague in nature. Few people I believe would dispute that the Bar treads on imprudent ground by injecting sexual conduct into consideration of a Bar application.

On the issue of nonsupport, the opinion does not indicate that he was guilty of nonsupport, but does say that he was "charged" with it. The statement in the court's opinion however, appears to be in the nature of restating a mere allegation. Once again, depending on the circumstances and who you ask, nonsupport may or may not be considered as "immorality and other dishonorable conduct." Was paternity proven? Was visitation an issue? Was the allegation a lie and he had checks proving he made payments? These facts are unknown from the opinion. It is also noteworthy that the Court's opinion states as follows:

> **". . . respondent's testimony that he had explained his divorces in an interview with the Committee on Character and Fitness of the State Bar of Michigan was unrefuted by the Administrator."** [283]

Apparently, the divorce proceedings had already been considered during the admissions process. The State Bar accepted his explanations and admitted him. Then years later, notwithstanding the rubber stamp of approval given by the State Bar, the Grievance Board attacks him on the exact same issue again. The ethical dilemma they face is obvious. **By attacking the Respondent for lacking candor during the applications process, years after the Bar has approved his explanation, they are substantively attacking the decision-making process of their own State Bar admissions committee.**

It may be that the Judicial Tenure Commission suspended the Respondent from being a Judge for engaging in judicial misconduct with good cause. I don't know. After doing so however, the Grievance Board's action against him in his capacity as an attorney smacks of being wholly political in nature, based upon the obvious inherent constitutional infirmity of the application question they attack him under, and the overall manner in which they launched their payback.

MINNESOTA

279 N.W. 826 (1979)

THE CONSTITUTION PRECLUDES DENIAL BASED ON APPLICANT'S BANKRUPTCY, BUT WE CAN DENY ADMISSION BASED ON THE FACT HE DIDN'T PAY DEBTS

The first sentence of the opinion's first paragraph reads:

> **"**The Supremacy Clause of the United States Constitution **precludes the denial of admission to the bar on the basis of a prior bankruptcy or on the basis of an applicant's unwillingness to pay debts** previously discharged in bankruptcy**."**

The first sentence of the second paragraph then reads:

> **"Applicants . . . who** flagrantly disregard the rights of others **and default on serious financial obligations, such as student loans, are lacking in good moral character** if the default is neglectful, irresponsible, and cannot be excused by a compelling hardship that is reasonably beyond the control of the applicant."

The Court goes on to justify denying admission based on a discharge of student loans in bankruptcy. Am I missing something here? Isn't that what the Court conceded that it could not do in the first sentence of the first paragraph ? The Court irrationally attempts to justify what it lamely purports to be the logic of its' position by asserting that conduct prior to bankruptcy, such as defaulting on student loans can be considered in the admissions process. Apparently, the Court's position is that while the bankruptcy itself can not be considered, the failure to pay the debt which was discharged in bankruptcy can be considered. The logic is ridiculous, and no, I am not kidding, that is the Court's so-called "opinion." I quote the various self-contradicting provisions of the Court's opinion at length as follows:

> ". . . he was requested by the Board of Law Examiners to appear before them to review the circumstances surrounding the discharge in bankruptcy of certain student loans obtained . . . to finance his education. After formal hearing, the Board determined <Applicant> . . . did not meet the standards required of applicants for admission . . .
>
> There is nothing connected with <Applicant's> bankruptcy to suggest that there was any fraud, deceit, or conduct which could be considered to involve moral turpitude. However . . . the Board of Law Examiners found in part :
>
> > "XXIII.
> >
> > **"Procuring discharge of this indebtedness (and no other) with so little effort to repay . . . while neither illegal nor constituting action evincing moral turpitude, nonetheless is conduct would could cause a reasonable man to have substantial doubt concerning applicant's honesty, fairness, and respect for the rights of others and for the laws of this state and nation amounting thereby to a lack of good moral character . . . ."**

The fact of filing bankruptcy or the refusal to reinstate obligations discharged in bankruptcy cannot be a basis for denial of admission to the bar. . . . **Any refusal so grounded would violate the Supremacy Clause of the United States Constitution since applicable Federal law clearly prohibits such a result.** The leading case on this issue is Perez v. Campbell, 402 U.S. 637 . . . . In that case, the Supreme Court considered the constitutionality of a state statute which precluded a person from driving if he had an unsatisfied judgment arising out of an automobile accident. In effect, a person who had such a judgment discharged in bankruptcy could not drive unless he reaffirmed the discharged debt. The court held the statute violated the Supremacy Clause . . . .

. . .

However, these constitutional limitations do not preclude a court from inquiring into the bar applicant's responsibility or moral character in financial matters. The inquiry is impermissible only when the fact of bankruptcy is labeled "immoral" or "irresponsible," and admission is denied for that reason. **In other words, we cannot declare bankruptcy a wrong when Federal law has declared it a right.**

Thus, in the present case, . . . conduct prior to bankruptcy surrounding his financial responsibility and his default on the student loans may be considered to judge his moral character. However, the fact of his bankruptcy may not be considered, nor may his present willingness or ability to pay the loans be considered because under Federal bankruptcy law, he now has a right to not pay the loans.

. . .

. . . The Florida court has considered the issue twice, and the contrast in the cases is instructive. . . . The Florida Supreme Court . . . stating . . . :

> "The petitioner's admittedly legal but unjustifiably precipitous action, initiated before he had obtained the results of the July bar examination, exhausted the job market, or given his creditors an opportunity to adjust repayment schedules, indicates a lack of the moral values upon which we have a right to insist for members of the legal profession in Florida. . . .
>
> To foreclose any misconstruction of this decision, we must emphasize that this ruling should not be interpreted to approve any general principle concerning bankruptcies nor to hold that the securing of a discharge in bankruptcy is an act inherently requiring the denial of admission to the bar. . . .

. . .

In the second Florida case, . . . the court held that an applicant who had discharged his student loans in bankruptcy should nevertheless be admitted because the circumstances surrounding his default were justified. . . .

. . .

In these two cases, the Florida court failed to squarely address the constitutional issue of denying . . . licenses on the basis of bankruptcy. **We have reservations as to whether it was constitutional for the Florida court to consider the morality of any motivations for filing bankruptcy when the Federal Government has declared the bankruptcy proceeding to be legal and presumably beneficial to the welfare of the individual and society.**

. . . We hold that applicants who flagrantly disregard the rights of others and default on serious financial obligations, such as student loans, are lacking in good moral character . . . .

. . .
. . . We have based our decision solely on the circumstances surrounding . . . default on the student loans and the resulting failure to satisfy this important obligation. . . . subsequent conduct of obtaining discharge in bankruptcy and release from the default is of no concern to us." [284]

My view of this case? The Minnesota Supreme Court did precisely and exactly what they conceded would violate the Supremacy Clause of the constitution, in the very first sentence of the opinion. They denied admission to an Applicant on the basis of his unwillingness to pay debts discharged in bankruptcy. The Court's attempt to justify its' position by playing transparent manipulative word games with logic just makes them look ridiculous.

433 N.W.2d 871 (1988)

NOW, WHO REALLY ENGAGED IN THE "CONTINUED DECEPTION?"

The Applicant plagiarized a paper while in law school. The professor informed him the paper was unacceptable because it was plagiarized and recommended that he be expelled. In a subsequent interview with the Associate Dean, he was informed that he would receive an "F," but could remain in school. When he applied for admission, the following question was on the application:

> "Were you ever placed on probation, disciplined, dropped, suspended, or expelled from school, college, university or law school?"

The Applicant submitted a detailed explanation of the law school incident noting that he received an "F" and "no other action was taken." A Hearing was held. The professor and Associate Dean testified and the Applicant admitted the plagiarism. He explained he had been under the stress of time pressures, had just begun a new job, his wife was injured in an automobile accident, and his 16 year old son had run away from home. When his son returned, he had to address his son's truancy at school. The Professor maintained the plagiarized paper was a "crystal clear case of plagiarism" and affirmed that he had recommended expulsion. The Associate Dean on the other hand, considered the failing of the class a severe sanction.

The Board concluded that not only had he plagiarized the paper, but also that he had attempted to deceive the Board with his detailed explanation of the incident on his application. In addition, they concluded he continued to attempt to deceive the Board at the formal Hearing. Their irrational assertion of deception was predicated on the following response the Applicant gave to the application question:

> ". . . Applicant was notified . . . that the paper was unacceptable because of endnoting omissions. It was pointed out to the applicant that no authority had been cited for a lengthy direct quote and other endnotes were incomplete. Applicant subsequently received an F grade for the class, no other action was taken. **Dean of Students . . . found that the paper defects were ones of omission rather than intent.** Applicant admits his failure to scrutinize the papers content due to family problems."

His explanation did not include, the word "plagiarism," and as a result the Board concluded his response was untruthful. This was notwithstanding that the Dean's letter confirmed the issues were ones of omission and incomplete citations. The Court rules in favor of the Applicant. It is a well written opinion and states:

> ". . . We think that the disclosure of the incident on the application was sufficient to alert the Board . . . .
>
> **. . .**
>
> At the hearing, counsel for the Board dissected the paper line by line and phrase by phrase. Again and again, petitioner admitted responsibility as he initialed each plagiarized passage. Petitioner also attempted to explain the incident to the Board at the hearing. He cited his wife's health, computer problems, stress in his family. **He had not raised all of these explanations during his brief interview with <Dean> at a time when he was noticeably upset. Yet we do not think the record supports the Board's conclusion that these omissions amounted to petitioner's continued deception of the Board."** [285]

This was the Board's concept of "continued deception." When the Applicant spoke with the Dean, he explained about the time pressures. He had not however, explained each and every element giving rise to the time pressure. When he tried to do so with the Board, they contended he engaged in deception. The Court sees the Star Chamber tactic being used.

An equally important issue is raised by this type of case. If the Bar is going to engage in tactics such as labeling good faith explanations accompanied by an admission of guilt, as "continued deception," then how can we really trust the Bar? Can we assume the Bar's general lack of a sense of justice and fairness is isolated to this case? Or is it evidence of a greater pattern of deceit and manipulative trickery being employed by the Bar on a wide scale basis? Stated simply, does the Bar itself possess the requisite character to regulate the legal profession, if it does so by concealing its own inadequacies at the expense of others?

The Applicant should obviously be admitted. He screwed up with footnotes on a paper. That's it. He wasn't trying to get the paper published. He wasn't trying to sell the paper, or make it look like he was a brilliant author. He was hoping to grab a quick "C" or "D" grade with little effort, because he had many family problems at the time. If State Bars simply screwed up on their footnotes, I wouldn't even be writing this book. They do a lot more. **They pervert the admissions process of a branch of government to foster the economic interests of their attorneys in violation of the Constitution and antitrust laws. They assert that their regulation of attorneys provides the public with competent and zealous representation, when in fact those attorneys regularly sell out and betray their clients. They enact Unauthorized Practice of Law rules that are designed to foster anticompetitive interests, and then falsely inform the public that those rules are enacted for the purpose of protecting the consumer. In doing so, they lack candor, moral character and truthfulness.** They regularly violate their own rules of procedure in the hopes of applying a strict standard of justice to litigants and Applicants, while allowing themselves to be the beneficiaries of a liberal standard. Omitted footnotes? I'd be thrilled if that were all the Bars were guilty of.

The professor in this case was correct to point out the deficiencies, but for the most part appears to have been essentially a Chop Buster by attempting to get the guy expelled for such an isolated and relatively speaking, minor matter.

451 N.W.2d 330 (1990)

I'M GUILTY. WAIT, I MEAN INNOCENT.
IF YOU SAY YOU'RE INNOCENT, YOU'RE GUILTY OF LYING.

In 1985, the Applicant was arrested for setting a fire at a radio station where she was employed. In 1986, at age 21, she pled guilty to setting the fire. She graduated from law school in 1988 and was informed by the Bar that it decided tentatively to not recommend admission. A formal Board Hearing was held on August 25, 1989. She testified at the Hearing that she was innocent of the offense to which she had pled guilty. Why plead guilty if one is innocent ? She explained that the prosecutor offered a deferred sentence with expungement on completion of probation, and that although her attorney felt she would be acquitted, the attorney also advised her there was a risk she would not. Weighing the alternatives, she felt the risk of trial was too great.

The Board concluded that she committed arson and also lied under oath by denying her guilt. It concluded that her application should be denied. During the Hearing, two other incidents came to the Board's attention based on the testimony of the arresting officer in the arson incident. From 1982 - 1983, the Applicant was employed at a different radio station. She reported to the Sheriff's Department that people at the radio station were harassing her. The officers concluded the allegations were false and as a result, her employment was terminated. The Board noted that she failed to disclose the job termination on her application. She countered by noting that she did not have to disclose her employment at the first station because the application inquired only about employment "held within the last five years." She was terminated by the first station on April 14, 1983 and her application to the Bar was dated April 14, 1988, one day outside five years. [286]

The Court denies admission. My decision would be dependent on whether the conviction had been expunged. If it was expunged, then it can not be considered. If it had not yet been expunged, I would also deny admission. Her assertion of innocence at the Hearing is unpersuasive for the following reason. Although she raises a valid point that criminal defendants often plead guilty because they are afraid to take the risk of a stiffer penalty by going to trial, it is irrefutable that she did plead guilty. The dilemmas related to guilty pleas of people who may be innocent, are problems to be resolved outside the Bar admissions process. The basic concept I have stressed throughout this book is that the objective standard to be used, is whether one has been convicted of a crime. That is the standard our society has adopted. If you've been convicted of a serious crime, I am substantially less lenient, than in other areas which are sensitive to subjective interpretation.

She was convicted, and that is what matters to me. The crime she was convicted of was serious. It was arson. A small amount of time had passed between the conviction and her application (about 2 years), and also the date of the Court's opinion (less than five years). The opinion indicates that when she pled guilty, the prosecutor agreed that upon completion of probation, the criminal record would be expunged. The opinion does not however, indicate whether the expungement had yet occurred. In my view, that is the determinative factor. When the criminal record is expunged, she need not even disclose the incident on her application. That is what an expungement is supposed to do. It is supposed to wipe the incident off your record. For the Bar to assert otherwise, places it in a position of receiving preferential treatment, compared to the licensing agencies of other professions regulated by the other two branches of government. That is unacceptable.

One other point. Although I would not admit her, if the conviction had not yet been expunged, the Bar's assertion that she lied under oath by professing innocence is untenable. As long as she disclosed the conviction, I see no ethical dilemma in her continuing to profess innocence. When assessing her application, I would only give minimal weight to her assertions of innocence. By the same token, not giving substantial weight works both ways. Assertions of innocence do not constitute lying under oath, so long as she discloses the conviction. Essentially, the Applicant should be entitled

to explain why she believes the conviction was unfair, and to assert that she was innocent. In the absence of presenting substantial corroborating evidence supporting such assertions, minimal weight should be given to her assertions, but they certainly do not constitute lying.

This conclusion I believe must be reached in view of the fact that innocent people do often plead guilty, because they are afraid of the punishment to be inflicted if they take a case to trial. It is a conclusion non-adverse to my previous point that such dilemmas should be resolved outside the admissions process. I only conclude it is justification for allowing assertions of innocence, not as proof of innocence itself. The rules to be gleaned, with respect to Applicants who have pled guilty to a crime, should be as follows:

1. Conviction of a serious crime is grounds for denying admission, but does not conclusively bar admission. The determination should be based on assessing the factors of remorse, rehabilitation and the period of time lapsed since the conviction.
2. The Applicant does not lie when they profess innocence, even if they previously pled guilty
3. Minimal weight should be given to assertions of innocence after a guilty plea, in the absence of substantial corroborating evidence
4. Expungement relieves the Applicant of any responsibility to disclose a crime which they have pled guilty to

470 N.W.2d 116 (1991)

The Applicant submitted a lengthy application that was prepared with assistance of legal counsel. The issues focused on his involvement in litigation involving the sale of tax shelters. During the litigation, a default judgment was entered against him. Subsequently, he appeared pro se and was held in contempt of court for failure to comply with an order to supply information. A federal district court judge found he was one of three principal participants in a series of attempted real estate transfers which were "sham, devoid of economic substance and a contrived device to defraud the United States of its claim upon the property. . . ." The court concluded that he perpetrated the fraud through shell corporations. In a separate case, the U.S. Tax Court concluded his testimony was not credible. In another case, a jury convicted him of second degree assault, while his Bar application was pending. The Board found that he failed to provide them with an update of the status of his litigation. They denied admission. The Court also denied admission.

I would also deny admission. In view of his conviction for second degree assault, the decision is pretty much a slam dunk. It falls squarely into the category of an individual who should not be admitted because they have been convicted of a serious crime, with an inadequate lapse of time, and no evidence of rehabilitation.

This case is much more difficult if we **hypothetically** assume the Applicant did not have the assault conviction. Under such a hypothetical, using my proposed objective standard of character assessment, an individual who was found in a civil action to have committed "fraud" and given testimony that was "not credible," would be admitted to the Bar. Such a conclusion would appear initially to be incorrect. First glances however, are deceiving and my rebuttal would be as follows. If indeed, the Applicant committed "fraud," then he should have been criminally charged with such. If indeed, his testimony was "not credible" and can be proven to be not credible, then he should have been charged with perjury. In the absence of such criminal charges, however, I am left wondering whether the Applicant really did commit "fraud" or give testimony that was "not credible." If he committed those acts, why weren't criminal charges filed? Certainly, it seems that if the Judge was correct in his findings in the civil case, criminal charges were warranted.

In the last admissions case presented, I indicated I would deny admission to an Applicant who professed innocence in spite of guilty plea. I asserted that the protestation of innocence should be given minimal weight when accompanied by a conviction. The rule works both ways. I give negligible weight to purported civil findings of "fraud" and so-called findings that testimony is purportedly "not credible" if they are not accompanied by criminal charges and a conviction. If the Applicant in this case, truly committed the acts which the Judge said he did, then he should have been criminally charged. In the absence of criminal charges and a conviction, it is the legitimacy of the Judge's conclusions that cause me concern. [287]

502 N.W.2d 53 (1993)

IF THE BAR ADMISSION STANDARDS ARE DESIGNED TO PROTECT THE PUBLIC, THEN WHY DON'T THE SAME STANDARDS APPLY TO LICENSED ATTORNEYS?

The Applicant was a member in good standing of the Wisconsin Bar. In 1990, he applied to the Minnesota bar but failed to pass the exam. He applied again in 1991 and passed. On both occasions he completed an application that asked if he had any unsatisfied judgments, debts over 90 days past due, if he had ever been arrested or questioned regarding the violation of any law, and if he had ever been a party to or witness in any legal proceeding, civil, criminal or administrative. He answered all these questions, "no."

The Board received a report that in 1986 he was arrested on a bench warrant related to a paternity action for a child he fathered at age 17. He apologized for his failure to inform the Board. He was then asked to explain his failure to disclose the paternity proceedings. He explained that he thought the application question meant being "a party in litigating a matter from start to finish," and that he only appeared before an assistant court commissioner, not a judge. He thought the paternity action was extra-judicial in nature. The Board obtained copies of the complete file of the paternity proceedings. The files included a judgment for past support of $ 4196.17, but postponed repayment until further order from the court. It also imposed reporting requirements on him.

It appears the Applicant was never convicted of a crime based on the court's opinion. The Board did not recommend admission and he requested a Hearing. The Board concluded that he intentionally failed to disclose the paternity action, the unsatisfied judgment and his arrest on a bench warrant. The Board further concluded that his explanations lacked candor. The Applicant testified that he did not disclose his arrest because he thought it had been expunged. He testified that he did not disclose the paternity action because he thought it was extra-judicial in nature. The Court denies admission.

This case is a good example of how the admission process is not consistent with the standard applied to licensed attorneys. If a Bar is going to deny admission to this Applicant for failing to disclose a paternity proceeding and to pay support obligations, then that same Bar has a responsibility to suspend licensed attorneys who fail to inform it of their paternity proceedings or unpaid support obligations. Basic principles of fairness, equity and justice demand that Bar members be held to an equal or greater standard of conduct than Nonattorneys.

Otherwise, the Bar is hypocritical. The result is that when it purports to act in the public interest, imputation upon the Bar of its own standards results in the conclusion that the Bar lacks candor and truthfulness. The fact is that Bar Applicants are held to a higher, moral standard than licensed attorneys. The obvious hypocrisy precludes acceptance of the disingenuous assertion that Bar admission standards are designed to protect the public. Instead it demands a conclusion that the Bar admission standards are designed to enhance the economic, anticompetitive interests of the Bar. A strong Dissent in this case outlines the problem perfectly :

> **". . . in determining who shall practice law in this state and the conditions under which they shall be permitted to practice, we must be consistent, and we must be fair. In denying petitioner's admission, we are not being consistent or fair. If petitioner were currently admitted to practice law in Minnesota and was subject to discipline for the same acts for which we now deny him admission, I do not believe the result would be as harsh as here . . . . I believe, based on the facts before the court, that this applicant to the bar should not be subject to a far more harsh sanction than licensed attorneys who have, in addition to breaking the trust of their clients, committed forgery, perjury, or misappropriated client funds.**
>
> **. . .**

Judging from this court's recent actions, petitioner's acts would not merit such severe discipline if he was already a member of our bar. . . . In . . . 498 N.W.2d 256 (Minn. 1993), we suspended for a mere 45 days an attorney whose acts were much more egregious than those of petitioner. . . . numerous trust account violations, including the misuse, misappropriation, and commingling of funds. . . falsely certified to this court on his attorney registration fee statements that he properly maintained such books and records; and engaged in an ongoing pattern of neglect and noncommunication with regard to three separate client matters entrusted to him. . . .

In . . . 430 N.W. 2d 663 (Minn. 1988), we held that conduct which included preparing a false deed and causing it to be forged, notarized and filed, and issuing a false title opinion based on that deed warranted only a six-month suspension for a lawyer who had received three previous disciplinary admonitions. . . .

In . . . 403 N.W. 2d 239 (Minn. 1987), we suspended for only 90 days a lawyer who had . . . prepared and submitted to the court as evidence false affidavits, and who attempted to cover up this conduct by giving perjured testimony.

In contrast . . . the conduct which underlies the allegations against petitioner involved his personal affairs. He did not misuse client funds, engage in any misconduct in representing a client, or engage in any conduct of a criminal nature. **If the appropriate sanctions for these individuals were 6 month, 90 day and 45 day suspensions, respectively, I fail to see how we can say that petitioner is unfit to practice law in Minnesota. . . ."** [288]

MISSISSIPPI

No. 94-CA-00185-SCT (1994)

THE DOUBLE STANDARD

The Applicant was accused during the 1991 Bar exam of possessing study materials when she exited from the ladies room. Another Applicant said that she observed this in the hallway. The Applicant appeared before a review committee on March 1, 1991 to determine the necessity for a formal Hearing. The review committee felt she was not truthful and recommended a formal Hearing. She was determined to have cheated on the exam. The Applicant asserted to the Court that she was denied procedural due process because the notice of the meeting dated March 1, 1991 did not apprise her of the specifics of the charge or the identity of the witness accusing her. She was properly contending that the Board was evasive and misleading by "inhibiting her efforts" to rebut the evidence. The Court sees it differently and states:

> "However, the purpose of that meeting was to determine the necessity of a formal hearing, not to actually hold a hearing. . . . At no point has <Applicant>. . . indicated that were she given more advance notice and a greater opportunity to be heard, she could have presented additional or other information. **She has failed to show that in any way she could have presented a better or more persuasive case on her own behalf . . ."** [289]

This is typical of the standard applied by State Supreme Courts when the Bar is at fault. The standard of materiality adopted above is as follows:

> **The Bar's errors are harmless, unless the applicant shows she could have presented a better or more persuasive case.**

If the foregoing premise is valid, then why isn't the rule applied to Applicants stated as:

> **Omissions on the Bar application are harmless, unless the Bar shows that such omissions would have affected the final decision.**

The Courts hold that while the Bar's errors, omissions and evasiveness are harmless unless the Applicant could have presented a better case, the Applicant's errors and omissions warrant denial of admission because they inhibit the efforts to discover other information. The Courts are wrong and unfair. The Applicant in this case was unfairly condemned based on a mere unproven allegation from a future, fellow competitor. The Court applied two different standards of moral character. A lenient standard for the State Bar and a strict standard for the Applicant.

MISSOURI

807 S.W.2d 70 (1991)

ZERO + ZERO + ZERO = 1?

Missouri had a requirement that law students who anticipated taking the Bar exam, be subjected to a character review. The Applicant was born in 1939 and filed an Application for Law Student Registration in 1988. He was approximately 49 years old at the time of the application. He had been married and divorced three times. **The application asked him to state the grounds for each divorce.**

He asserted the three divorces were the fault of his ex-wives. (What a surprise.) He alleged the first committed adultery, the second left him for another man, and the third was addicted to drugs. He listed over twenty different employments after leaving high school. He disclosed three lawsuits in which judgments were entered against him, the largest being a $ 23,000 default judgment. He claimed the default was the result of misleading information supplied by a court clerk. He disclosed eleven lawsuits since 1980 in which he was a party. He had been charged with assault, theft and tampering with a utility meter. All charges were dismissed. He declared bankruptcy in 1970 and again in 1982. He stated he had several minor traffic tickets during the last 32 years, but did not specify the dates. The Board denied his application on character grounds. The sparks then began to fly. He requested a hearing in a letter that stated:

> **"Your letter to me . . . provides additional evidence that you, the other members of the State Board of Law Examiners, the 13th Judicial Circuit Bar Committee . . . and certain judges within the Circuit Court . . . the Missouri Court of Appeals . . . and the Missouri Supreme Court have been presently engaged in a criminal conspiracy to deprive me of civil and fundamental rights . . . because I have been openly critical of the corruption and judicial bias which exists within several Missouri and Illinois court . . . and because I have repeatedly attempted to exercise my rights."**

He cited several examples of corruption and judicial bias. He accused a U.S. District Court judge of coercing a clerk into perjuring herself, an Illinois state attorney of presenting perjured testimony, and various judges of permitting surprise, unfair advantage and deceit in a lawsuit he filed. He referred to the Board's letter as nothing more than the:

> **"pompous braying of a legal jackass in furtherance of the criminal conspiracy to oppress me for attempting to exercise my constitutional rights."**

In the last paragraph of his letter, he stated:

> "I hereby serve notice on all parties concerned as detailed above that I will immediately file appropriate charges with the United States Attorney General's office, and then I will sue in federal court each conspirator individually for actual and punitive damages."

Shortly thereafter, he made good on his commitment, naming, as defendants the members of the Board. He filed documents with the Board seeking answers to interrogatories, requests for admission and a motion for production of documents. The Board did not respond. At the Hearing, he asserted that when faced with his allegations, the appellate judges had no choice but to grant relief or join the conspiracy. The Board rules against him and the Supreme Court of Missouri affirms. The Court's opinion states:

> "The divorces, bankruptcies, criminal charges, multiple employments, traffic convictions, emotional problems and participation in litigation **may not, as individual incidents, be indicative that . . . is unfit or of immoral character. However, the incidents are not examined in isolation,** but in connection with each other and in connection with the unfounded charges of personal and professional impropriety against unpersuaded judges and opposing litigants . . .
> **. . .**
> Consistent with his approach in other legal proceedings, he repeatedly accuses the surrogate of bias and intentionally misquoting facts. As previously noted, the factual findings of the surrogate are not binding. This Court conducts an independent review of the record . . . The arguments attacking the surrogate's findings need not be addressed.
>
> . . .<Applicant> has failed to establish that he has the moral character and general fitness . . . . Accordingly, the decision of the surrogate for the Board of Law Examiners denying his application for registration as a law student is affirmed."

The Board and Court were wrong. They had nothing on this guy. He was never convicted of any crime, based on facts set forth in the opinion. The divorces were none of their business. He engaged in a lot of litigation, but that is his constitutional right. Lawyers do it all the time. That's how they earn a living. He declared bankruptcy and that is a federal right. The traffic offenses are immaterial. The arrests all resulted in dismissal.

Since the Bar had nothing on him, the Court adopted a logically flawed approach. **To keep him out of the Bar, it reasons that an accumulation of minor, immaterial incidents equates to a material reason for denying admission. They are wrong. Zero plus zero is still zero, not "1" as the Court here asserts.** The fact that he was openly criticizing the Judiciary in exercise of his First Amendment rights, makes the Court's motivations in this case more circumspect. They have motive and opportunity through the admission process to impose a payback. The Court included within its accumulation of facts theory, the issue of "multiple employments." **The Court appears to be suggesting that having numerous jobs over a period of time and not staying with one employer reflects negatively upon the character of an individual. Such a suggestion, whether viewed from a perspective of law or morality (noting that the two are often quite dissimilar) is insulting.** The Applicant was about 49 years old. He had over 20 different employments since leaving high school. That's 20 jobs over about 31 years. Approximately a year and a half per job. Admittedly, somewhat lower than the national average, but not immensely lower. In any event, the matter is irrelevant. **There is nothing criminal or immoral about leaving jobs. Often it personifies a person who is individualistic, creative, searching for something better, new and exciting, and unwilling to adopt a lifestyle where they settle for less.** Some people like frequent change in their lives. The Court is way out of line to suggest that multiple employments constitutes grounds for denial of admission.

One last point. The following portion of the opinion is particularly disturbing:

> "he repeatedly accuses the surrogate of bias and intentionally misquoting facts. As previously noted, the factual findings of the surrogate are not binding. This Court conducts an independent review of the record . . . **The arguments attacking the surrogate's findings need not be addressed.**
>
> . . . the decision of the surrogate for the Board of Law Examiners denying his application for registration as a law student is affirmed." [290]

If his arguments attacking the surrogate's findings were correct, the likelihood that the admissions process was unfair, is increased. Consequently, equity and justice mandate that the Court's "independent review" include consideration of those arguments. Assessing the propriety of the admissions process, requires consideration of arguments attacking the findings. How can you not address them? They form the basis for the decision. How can the Court rationally affirm a decision without considering arguments that attack its' foundation? They can not do it rationally, only irrationally.

NEBRASKA

508 N.W.2d 275 (1993)

THE PETTY LITTLE BABY BAR

The Applicant was denied admission on character grounds. He disclosed that in 1991 he was disciplined in law school for making personal use of student funds. He also disclosed that in 1992 he was charged with speeding while his license was suspended. He did not disclose, that in 1982 he encountered the justice system for writing a bad check and that in 1991 he was charged with shoplifting. The first of the above incidents occurred on March 20, 1991 when, as treasurer of the student chapter of a lawyer's association he wrote a check to himself for approximately $ 300.00. Although no one confronted him, he repaid it within a week and notified the chapter president of his actions. He explained that his father suffered a stroke in 1990 and as a result he took responsibility for managing his parents' household. During this time he was serving as a law clerk, president of a student organization and was active in political campaigns. The transmission in his automobile then went out. Being between paychecks, he felt he was between a rock and a hard place. He stated:

> "If I did not repair my car, I could not work, and could not get to classes. If I did not work, I could not earn money to repair my car."

When questioned by the commission, the following took place:

> Q. Do you feel that what you have told us about this situation excuses your action?
>
> A. Oh, no. There is never an excuse for that action. I think there are mitigating factors that perhaps should enlighten on why I acted the way I did. No, I never expect to be excused for the wrongs that I have done.

Absolutely, a great answer. In reference to the speeding ticket, it is too trivial to even consider. The bad check charge was dismissed. The shoplifting charge related to taking a pack of cigarettes at a restaurant. He said that he accidentally left without paying. He completed a pretrial diversion program and performed 30 hours of community service. It appears no conviction resulted due to his agreement to participate in the pretrial diversion program. In describing these matters the Applicant told the commission:

> "I'm not asking you to bury your head in the sand or look the other way with the transgressions I had in the past or with my omission because they're all serious and you're justified in raising the questions about them . . . . I would never intentionally hide something from this Commission because . . . I knew that I would come under scrutiny because I know the things that --the two very serious things that were reported were quite serious and you would take a look at them."[291]

This Applicant knew the Bar admissions game very well. His answers are perfect. The Court denies admission. I would definitely admit him. He has no convictions. The incidents are all fairly trivial. When I read the part of the opinion indicating that he participated in **"political campaigns"** I can not help but wonder whether he was a Democrat or Republican, and whether the Nebraska Board and Court were comprised of members of the opposing party. The guy drove fast, wrote one bad check

over a decade in the past, wrote a check to himself that he shouldn't have, which he paid back before anyone confronted him, and took a pack of cigarettes. No convictions. He should be admitted.

The Board and Court were probably annoyed that he was too much of a political smoothy. I myself concede that I don't buy into the excuse that he accidentally left the restaurant without paying for the cigarettes, but in the absence of a conviction, the Court lacked sufficient grounds to deny admission.

Supreme Court of Nebraska, No. S-34-950003 ; LLR No. 9604023.NE ; Versuslaw 1996.NE.200 (1996)

WHAT HAPPENED TO ALL THAT STUFF ABOUT MISLEADING INFORMATION REFLECTING ON CHARACTER?

This is a great case because it demonstrates how the Bars don't like it when rules are applied strictly to them, and how Courts adopt liberal standards when interpreting their own misleading rules. It is not a character case. It deals with educational qualifications. It's a perfect example of the double standard that I have been discussing throughout this book. The Applicant qualified for admission to the Bars of Michigan, Indiana and the District of Columbia. Nebraska Supreme Court Rule for Admission of Attorneys (5c) read as follows:

> "Educational Qualifications . . . . Every applicant must have received at the time of the examination **a professional degree** from a law school approved by the American Bar Association."

The Applicant had a "professional degree" from a law school approved by the American Bar Association. Although he had graduated from an unaccredited law school, he then received a **master of laws (LL.M.) degree from the University of San Diego School of Law, an ABA approved law school.** He received a letter from the State Bar admissions clerk that read as follows:

> "Under the Nebraska rules for admission of attorneys, **an attorney admitted in another state may be admitted in Nebraska without examination if he or she** . . . is a **graduate of an ABA approved law school and was admitted in another state** after an examination similar to the examination administered in the State of Nebraska. . . ."

The Applicant asserted that he was:

> **"duped by the cover letter into believing that he satisfied the requirements for admission"**

The Bar and Court had screwed up drafting Rule (5c) when they used the phrase, "professional degree." What they really had wanted to require was a juris doctor degree from an ABA law school. The Court, rather than owning up to its own carelessness, writes an opinion that reads:

> **"While the use of "professional degree" rather than "first professional degree" may have appeared to be a loophole through which graduates of non-ABA-approved juris doctor programs could gain access to the Nebraska bar, we hold today that "professional degree" contemplates only a juris doctor degree."**

In reference to the Applicant's claim that he was "duped" by the cover letter, the Court writes:

> "This argument fails. As the letter states, a copy of the Nebraska Supreme Court Rules for Admission of Attorneys -- which included rule 5--was enclosed for . . . review. **As an attorney, <applicant> should understand that the question of his admission would be governed by Supreme Court rules and not by a summary of those rules in a cover letter.** We will not fault the state bar commission for <applicant's> failure to read the rules that were provided for his review and were referenced in the very cover letter that he claims misled him." [292]

Hold on!! What happened to all that stuff about "false representations" bearing upon one's character and fitness? What happened to all that stuff about being "misleading?" **Looks to me like we now have a pretty different standard when incorrect information is provided by the Bar. As for the Court's statement that the Applicant should have just read the rule. He did. The Court acknowledged that the rule didn't mean what it said. The rule said "professional degree." It didn't say "juris doctor degree." An LL.M. is a "professional degree."** The Court was "misleading," "evasive," and lacking in "candor." The Court screwed up when it enacted the rule, and was seeking to correct its' own screw-up by manipulative use of word interpretation in a post hoc manner.

One thing is irrefutably certain. If you apply the same standard for assessing misleading information upon the Justices of the Court regarding Rule 5(c), as applied to Applicants by the Bar, you would have Nebraska State Supreme Court Justices that would not be admitted into their own State Bar on moral character grounds.

Supreme Court of Nebraska, Case No. S-34-950002 ; LLR No. 9603025.NE; Versuslaw 1996.NE.137 (1996)

THE OBNOXIOUS BAR APPLICANT

The Applicant at various times was admitted to the Bars of Colorado, Iowa, Nebraska, Texas, Virginia and the District of Columbia. He permitted his Nebraska membership to lapse in 1978 and applied again in 1994. He did not disclose his prior admission to the Nebraska Bar.

He also failed to list any employment from October, 1990 through October, 1994. He later wrote in a letter that he was unemployed during the period and then another letter stating he was employed in temporary jobs. Question 11 of the application inquired if any civil actions or judgments had been filed against him. He answered affirmatively, but did not attach the necessary forms to the application.

The Commission then received information indicating that he exhibited confrontational, obnoxious, paranoid and threatening behavior. Apparently, in 1995 while attending a BAR-BRI Review course, he could not locate his keys and accused other students of taking them. He threatened to fight a male student and was asked to not participate further in the course. A few other similar incidents were disclosed. None resulted in arrests, charges or convictions. He just seemed to argue a lot in an abrasive manner. The following exchange during the Bar Hearings is indicative:

Q. Well, it was a stormy night that night, is that correct?

A. No, it was not. We're going to talk about the weather now(?)

. . .

Q. Aren't you glad you didn't go outside with him?

A. I think that's kind of a silly question.

. . .

Q. What's the title of the one that was published?

. . .

A. . . . I don't see what relevance this has . . .

He then wrote some letters to the Bar Commission, that apparently went over about as good as a turd in a punch bowl. Some examples are as follows:

> **"I do not think slanderous innuendoes constitute sufficient grounds to deny me a license to practice law in the State of Nebraska. . . . I note your sarcastic use of the phrase "working with dispatch" in your letter. If the Commission had worked with dispatch on my application, the investigation would have been completed by now. . . .**
>
> **. . . Apparently, my failure to fail has again found your side "delaying the game". I use the words "your side" because this process has taken on the characteristics of a football match, not an administrative inquiry. Are you hoping that if you delay long enough, something negative will happen to disqualify me for admission?**

It was a good letter! I like it. The Court apparently didn't though and denies admission. Why admit someone that doesn't like you, unless the constitution requires it? The Court's opinion states:

"Also of concern is his belief in various conspiracies being aligned against him. In his interview in January 1995, . . . asserted that because as an attorney he had taken on powerful interests in Texas and because Colorado is dominated by Texas investors, Texas businessmen, and Texas finance, there was an effort on the part of various people in Colorado to politically harass him. . . . stated that the reason a judge in Colorado Springs filed an ethics complaint against him was out of political animosity because "she's a conservative judge in a conservative county. . . .

. . . also implies that the commission was politically motivated in its investigation of his character and fitness. **This assertion had been made earlier in a letter . . . to the commission, in which he objected to the "inquisitorial approach to <his> Bar admission . . . .**
. . .
Apparently, . . . is arguing that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent conduct does not reflect on his "honesty, trustworthiness, diligence, or reliability." He is wrong.

. . . Canon 7, EC 7-37, provides that although ill feelings may exist between clients in an adversary proceeding, such ill feeling should not influence a lawyer in his or her conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

The requisite restraint in dealing with others is obligatory conduct for attorneys. . . .

. . . When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike manner. **Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence. . . .**

Moreover, the qualities listed in the rule are merely illustrative; "the fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis." . . . We therefore join other courts in holding that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar. . . .

Even if we assume, arguendo, that . . . believes he is the victim of conspiracy which encompasses various interests, ... Belief unrelated to reason is a hallmark of fanaticism, zealotry, or paranoia rather than reasoned advocacy. . . .

Verbal abuse, unfounded accusations, and the like have no place in legal proceedings. . . ."

The Court then addresses the issue of what it purports to be a lack of candor as follows:

"Question 7 of the application read : "List every job you have held for the ten year period immediately prior to the date of this application or since the age of 18, beginning with your present employment, if any. . . . **<Applicant> explained that he had failed to list the Colorado temporary employment because he held simple common labor jobs, and he may have either**

> **misread the question or forgotten about the jobs. We agree with the commission's determination that such an explanation is not credible. . . .**
>
> In addition, not only did <applicant> fail to list his former membership in the Iowa bar, but he failed to reveal that he had previously been a member of the bar of this state, ...
>
> **Contrary to the commission's implication**, **we have never held that in order to be found to have lacked candor in filling out an application, an applicant must have had an intent to deceive.** On the contrary, . . . we observed that "false, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness." While an intent to deceive will reflect on whether such answers are false, misleading, or evasive, . . . an applicant who recklessly fills out an application . . . is just as culpable of lacking candor . . . as is the applicant who intends to deceive the commission."

A strong Dissent makes excellent comments. Before addressing them however, I have a few comments of my own in reference to the above passage. The Court's opinion, I believe is characterized by a general lack of understanding of what litigants seek from their attorneys. The opinion is embodied by a fundamental hypocrisy, lack of candor, and constitutional infirmities. I will dissect portions of their opinion on a piecemeal basis. In doing do, I will apply the Court's own standard of what constitutes a "lack of candor." The Court states:

> **". . . When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike manner.** Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence. . . .
>
> Moreover, the qualities listed in the rule are merely illustrative; "the fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis." . . . We therefore join other courts in holding that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar. . . ."

The Court is wrong!! **When members of the public engage attorneys, they want one thing and one thing only. They want an attorney who will do everything legally possible to fight on their behalf and win their case. The litigants could not care less whether their attorney exhibits abusive, disruptive, intimidating or turbulent behavior. In most cases, quite to the contrary, the litigant will view such as a positive attribute of the attorney. They will see an attorney who cares about their case and is fighting for their position.**

The Court's false characterization of what the public desires must be considered in the following light. Either the Court knew what it was saying was false, or at best the Court did so inadvertently because it lacked a general understanding of what litigants want. The former is manifested with an intent to deceive, the latter is not. Since this Court, however believes that finding a lack of candor does not require the element of an "intent to deceive," then in either instance, the inescapable conclusion is that the Court lacked candor. The Court does not survive scrutiny under its' own standard of candor.

An attorney has an ethical responsibility to not commit a summary contempt and to not commit an illegal act. For the most part, that's it! Purported unconstitutional notions of verbal civility, serve to foster a view of the legal profession by the public as a "Club." A "Club" where the attorneys

consistently waive objections and get along with each other, while the litigants pay the price. The legal profession in this nation is supposed to be an adversarial system. That means the public is hiring at their financial expense, lawyers who are supposed to fight, fight, fight, on their behalf. Not Kiss the Ass of opposing counsel! In reference to the omissions issue, the Court states:

> "Question 7 of the application read : "**List every job you have held for the ten year period immediately prior to the date of this application or since the age of 18, beginning with your present employment, if any**. . . . <Applicant> explained that he had failed to list the Colorado temporary employment because he held simple common labor jobs, and he may have either misread the question or forgotten about the jobs. We agree with the commission's determination that such an explanation is not credible. . . .
>
> In addition, not only did <applicant> fail to list his former membership in the Iowa bar, but he failed to reveal that he had previously been a member of the bar of this state, ..."

The omission is immaterial because the question is unconstitutional suffering from overbreadth. "Since the age of 18" is an unreasonable period of time to request an employment history from a man who is obviously at least middle-aged. The question is also vague and ambiguous as to whether the employment history is required for the last ten years or alternatively since the age of 18. It states according to the Court's opinion:

> "List every job you have held for the ten year period immediately prior to the date of this application **or** since the age of 18,. . ."

The operative term is "or." Which portion of the rule applies? I can't tell from reading it. Finally, regarding what constitutes a lack of candor the opinion states:

> **"Contrary to the commission's implication, we have never held that in order to be found to have lacked candor in filling out an application, an applicant must have had an intent to deceive. . . ."**

If the Court is correct, then the commission's faulty "implication" that intent to deceive is a required element constitutes a "lack of candor." This assumes of course, that one judges the Commission using the Court's own definition of what constitutes a lack of candor. The Dissent states:

> **". . . Until today, . . . being obnoxious, having a quick temper, and being hard to get along with were not grounds for the extreme sanction of denial of admission to the Nebraska bar. The majority reaches far beyond the current rules governing admission . . . .**
>
> **. . . While I do not approve of such characteristics, there are no bar admission rules for excluding an applicant on such grounds.**
>
> **. . .**
>
> . . . Rule 3 provides authority for the bar to deny admission for behavior which manifests "a significant deficiency in the honesty, trustworthiness, diligence, or reliability" of an applicant. Obnoxious and rude behavior by definition simply do not reflect on one's character . . . .
>
> **Dishonesty and incivility are two vastly different behavioral traits. Rule 3 reaches the former, but simply does not reach the latter.** Nothing in the record suggests that . . . has

manifested dishonesty toward clients, adversaries, courts, or others . . . . Rule 3 is not a catchall exclusionary rule reaching all sorts of personality defects in applicants.

The majority explains that we must preclude . . . from membership in the bar in order to protect the public**. However, <Applicant>. . . has practiced law in a number of states since being admitted to practice in 1977. Whatever interpersonal problems . . . may have, they apparently have not led to injury to his clients.**

. . . <Applicant> is accused of lacking candor based on two omissions on his bar application. First, . . . failed to report approximately 60 to 100 hours of temporary employment during a 5-week period in 1993. . . .

Second, . . . failed to report that he was formerly a member of the Iowa and Nebraska bars. . . . noted that there were only three lines available on the application for listing past or current bar memberships. . . . speculated that once he filled in those three lines . . . he intended to attach an extra sheet listing these memberships, but forgot to do so . . . .

Whatever the case, an allegation of lack of candor is only probative of one's character for honesty if there is evidence of some intent to deceive, or at least purposeful evasiveness. The record does not show any such intent or even any motive . . . .

Nevertheless, the majority concludes that an applicant who "recklessly" fills out an application--and as a result the application contains false answers--is just as culpable of lacking candor in the application process as an applicant who intends to deceive the commission. . . .

If the goal of the "lack of candor" standard is to ensure that potential attorneys are not dishonest, then a rule which holds that lack of candor can be established without showing any culpable state of mind is a rule that does not advance its own purpose.

Moreover, such a rule completely ignores the "use of information" instructions that we have issued to the commission. . . "the following factors should be considered in assigning weight and significance to prior conduct: . . . 10. **the materiality of any omissions or misrepresentations." The majority's approach to application omissions ignores factor No. 10. . . .**" [293]

The Dissent wrote an exceptionally fine opinion that should have been the majority opinion. It makes a few points that require a bit of further comment on my part. **The Dissent notes that in reference to omitting temporary employment history the Applicant failed to report approximately "60 to 100 hours of temporary employment during a 5-week period in 1993." Apparently, the majority's characterization of the temporary employment as being between 1990 - 1994, was "misleading."** The majority was obviously attempting to falsely inflate the importance of the omitted employment history by quantifying it in terms of years, rather than the number of hours actually worked. The majority also "failed to disclose" in reference to the omitted State Bars, that only three lines were provided on the application. The number of lines provided were not even sufficient to fit the six Bars which the Applicant had been a member of. It appears the majority was trying to "evade" disclosure of this point and "lacked candor" in their characterization of it. And, what about the Court's own Rule 10 cited above by the Dissent for the premise that the materiality of omissions is a factor to be considered in assigning significance to prior conduct. The majority had ignored the rule. The express language of the Court's own rule directly contradicted the manner in which they defined "lack of candor" in the opinion.

1999.NE.0042260; 258 Neb. 159 (1999)

I still can't believe this case when I read it. There are many cases discussed in this book that are somewhat similar. But none other in which the Court states their position so blatantly. The Bar and Court expressly revealed their diabolical goals intentionally in this case. The Court's holding states:

> **"Notwithstanding the First Amendment** to the U.S. Constitution, **speech** and conduct of an applicant to the bar **may be considered by the Nebraska State Bar Commission to the extent such speech** and conduct **reflects upon the moral character** and fitness of an applicant to practice law."

The Applicant contended that his admission was denied, based on his speech which was protected by the First Amendment. The facts are as follows. As part of the admissions process, he was required to request the Dean of his law school to submit a form certifying completion of his law school studies. The form to be given to the Dean contained the following question:

> "Is there anything concerning this applicant about which the Bar Examiners should further inquire regarding the applicant's moral character. . .?"

The Dean answered the question "Yes" and subsequently disclosed the following information. After completion of his first semester at the University of South Dakota Law School the Applicant sent a letter to the assistant dean and closed the letter with the phrase, "Hope you get a full body tan in Costa Rica." He also wrote letters to her about receiving grades lower than he earned in an appellate advocacy class for the purpose of requesting assistance to appeal the grade. He then sent a letter to the South Dakota Supreme Court regarding an appellate advocacy professor's incorrect characterization of his legal arguments and indicated that copies of the letter were being sent to two federal court of appeals judges. He sent letters to various other people regarding the grade appeal. At the admissions Hearing he testified that no formal appeal of the grade was ever filed and the grade was never adjusted. He prepared a memorandum which he submitted to his classmates urging them to recall another "incident" where a professor lashed out at him in class, which he asserted reflected poorly on that professor's "professionalism."

He wrote a letter to a newspaper in South Dakota regarding a proposed fee increase at the USD law school. He then began investigating the salaries of USD law professors and posted a selected list of professor salaries on the student bulletin board. In his study carrel at the USD law library, he posted a photograph of a nude woman. When the librarian removed it, he contacted the ACLU and received a letter indicating that the photo might be protected expression under the First Amendment. He then accused law school authorities of unconstitutional censorship and redisplayed the photograph, which was once again removed by the law librarians. He filed an ethical complaint with the North Dakota Bar Association against the law school Dean which was dismissed. He contacted the press, and the president of USD referring to the law school Dean as incompetent. He contacted the student newspaper alleging that USD's student health insurance program was engaged in health insurance fraud, and that USD had suppressed an investigation of its health insurance carrier. He applied for an internship with the U.S. Attorney's Office in South Dakota and after the law school rejected his request, he sent a letter of complaint to all USD law school faculty members.

He indicated he would likely be filing a lawsuit against the law school Dean and warned other students that all lawsuits in which they were involved would need to be reported when they applied for admission to the Bar. Finally, he produced and marketed T-shirts on which a nude caricature of the law school Dean was shown sitting astride a large hot dog. The shirt contained the phrase, "Astride the Peter Principle" and he sent a memo to all law students in which he noted that his "Deanie on a Weanie" T-

shirts were in stock. Based on facts set forth in the Court's opinion, it appears he had no criminal convictions of any nature. The Court begins its analysis with the following misleading statement:

> "<Applicant> first assigns as error that the Commission's determination should not stand because it is based in large part upon **speech** that is protected by the First Amendment. Thus, the threshold question we must answer is whether **conduct** arguably protected by the First Amendment can be considered by the Commission. . . ."

The Court is incorrect right from the start. The Applicant was assigning as error whether his **"speech"** was protected. The Court immediately without basis reclassified his **"speech"** as **"conduct."** From a perspective of law, this is an absolutely critical distinction. The U.S. Supreme Court has held in numerous cases that **conduct** is subject to substantially less protection under the First Amendment than **speech.** The state regulatory agencies have an incentive to label what is in truth, "speech," as "conduct." The speech-conduct dichotomy is relied on by State Bars to irrationally justify Unauthorized Practice of Law prohibitions. The assertion they make is that when a person "speaks" in order to convey legal information, they are actually engaging in "conduct," not "speech." Rationality and reason mandate otherwise.

The distinction between what constitutes "speech" or "conduct" is both critical and ambiguous. When you talk to someone, your "speech" unavoidably contains elements of "conduct." Your facial expressions, hand movements, or even a raising of the eyebrows are elements of "conduct" that accompany your "speech." If they can be used to reclassify your "speech," as "conduct," your First Amendment free speech protections are diminished. That is what's going on in this case.

The Court wants to irrationally reclassify the Applicant's letters and statements as "conduct," rather than "speech," because this will allow them to bring such into the realm of regulation during the admissions process. The Court knows it treads on virtually sacred constitutional ground here. This case is a colossal attempt to grab power and sustain State Bar exemption from the U.S. Constitution that is unparalleled by any other case in this book.

The Court first reviews all the U.S. Supreme Court cases dealing with State Bar admission. Its' deceptive purpose in doing so, is to nullify those opinions by a manipulative use of logic and therefore constitutes a usurpation of the authority of the U.S. Supreme Court. Their diabolical brilliance comes up with the following:

> **"An investigation of <Applicant's> moral character is not a proceeding in which the applicant is being prosecuted for conduct arguably protected by the First Amendment, but, rather, "an investigation of the conduct of <an applicant> for the purpose of determining whether he shall be <admitted>." . . . <Applicant's> reliance upon cases where a judgment was invalidated at least in part because it was based on conduct protected by the First Amendment is therefore misplaced."**

The Court has now taken a second step. It is distinguishing between prosecuting an individual for engaging in what it calls "conduct arguably protected by the First Amendment" and investigating conduct of an Applicant. If however, the speech or conduct is protected by the First Amendment, then it is protected for purpose of either an investigation or a prosecution. The Court then writes:

> "Were we to adopt the position asserted by <Applicant> in this case, the Commission would be limited to conducting only cursory investigations of an applicant's moral character and past conduct. **Justice Potter Stewart**, writing for the majority in **Law Students Research Council v. Wadmond**, supra, noted that the implications of such an attack on a bar screening process are that no screening process would be constitutionally permissible beyond academic examination

> and an extremely minimal check for serious, concrete character deficiencies. . . . **Assuming but not deciding that <Applicant's> conduct may have been protected by the First Amendment. . . Wadmond, supra, makes clear that a bar commission is allowed to consider speech** and conduct **in making determinations of an applicant's character** and that is precisely what has occurred in the instant case. . . ."

It is a paragraph that warrants the same degree of respect as the despicable Dred Scott opinion which gave approval to slavery. As I indicated previously, I don't use profanity often, but do use it on occasion. This is a good occasion. The above paragraph written by the Nebraska Supreme Court is nothing but complete BULLSHIT. The reasons are as follows.

First, the U.S. Supreme Court case of ***Wadmond*** , which I discussed at length in a separate section herein on U.S. Supreme Court cases, positively does not stand for the premise that protected speech may be used by a Bar commission in making determinations of an applicant's character. The Nebraska Supreme Court has LIED by suggesting such.

Second, the Court in this case has essentially conceded that the Applicant's speech is protected. They stated**, "Assuming but not deciding that <Applicant's> conduct may have been protected by the First Amendment."** They made this statement because they know his speech was protected.

Third, if the speech or conduct is protected by the First Amendment, then the Court is violating the First Amendment by considering it for purposes of denying admission. Fourth, the character screening process should be used only for purposes of discovering serious, concrete, objective character deficiencies. It should not be used in a dangerous, subjective, arbitrary manner which is what the Nebraska Bar and Court are seeking to achieve in order to further anticompetitive interests of the legal profession. To do so, utilizes the character review process as a "dangerous instrument" which the U.S. Supreme Court warned about in the ***Konigsberg*** case.

Finally, it is important to note that the Nebraska Court cites Justice Potter Stewart with respect to the ***Wadmond*** case. As you may recall, when I discussed the three U.S. Supreme Court cases on admission handed down on the exact same day in 1971, I wrote at length about Justice Stewart. He ruled in favor of the Applicants in ***Stolar*** and ***Baird***, but in favor of the Bar in ***Wadmond***. He was undoubtedly the swing vote in those cases. They were all decided by narrow 5-4 margins.

I indicated that I could not conceive how Stewart could vote in favor of the Applicants in two cases and in favor of the Bar in the third, when the three cases were so similar. The Nebraska Court is correct in citing the importance of Stewart, but they are incorrect that he would have supported their crappy opinion in this case. Stewart voted in favor of the Bar in ***Wadmond***, based on a narrowing construction of a New York Rule and in fact, conceded himself that without such a narrowing construction, it would have probably been unconstitutional. Stewart most importantly properly recognized that protected freedoms can not be compromised during the Bar admissions process. Stewart wrote in ***Wadmond***:

> "If all we had before us were the language of Rule 9406 . . . this would be a different case. For the language of the Rule lends itself to a construction that could raise substantial constitutional questions, both as to the burden of proof permissible in such a context under the Due Process Clause of the Fourteenth Amendment. . . and as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments. . . . But this case comes before us in a significant and unusual posture. . . .
>
> The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow, **and fully cognizant of protected constitutional freedoms."**

That is the reason Stewart voted in favor of the Bar in *Wadmond*. Because the Rule was interpreted in a narrow fashion that was "fully cognizant of protected constitutional freedoms." Not because, the State Bar is allowed to circumvent constitutional freedoms as the Nebraska Supreme Court falsely asserts when it LIES on the issue.

While the best opinions written in the three U.S. Supreme Court cases handed down the same day in 1971 were by Justices Black and Marshall, arguably the most significant single statement was made by Justice Harlan in the *Stolar* case. Harlan for over a decade had been an unwavering supporter of the State Bars, and consistently opposed Justice Hugo Black who wrote the best opinions overall in this subject area. Harlan was weakening however, and just beginning to see the error of his ways, notwithstanding his votes in favor of the State Bars in 1971. In *Stolar*, Justice Harlan, the man who was the most absolute, staunchest supporter of the State Bars, wrote the following in reference to the *Wadmond* and *Baird* cases, suggesting he was beginning to see that there might come a time when the State Supreme Courts needed to have their pompous butts put in line:

> ". . . I have little doubt but that the candidates involved in *Wadmond* will promptly gain admission to the Bar if they straightforwardly answer the inquiries put to them without further ado. And I should be greatly surprised if the same were not true as to Mrs. Baird and Mr. Stolar in Arizona and Ohio. **But, if I am mistaken, and it should develop that any of these candidates is excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene."**

The Nebraska Supreme Court did not merely drop the ball in this case. They intentionally deceived the public, specifically for the purpose of grabbing a massive constitutional exemption for the Judiciary. Their opinion is nothing short of a total travesty. Ultimately, they deny admission to the Applicant on the ground that his "conduct" indicated he was prone to "characteristics which are not acceptable." They include the following statement in their conclusion:

> "The profession's insistence that counsel show restraint . . . is more than insistence on good manners." [294]

My opinion is as follows. It is apparent based on the record that the Nebraska Supreme Court can not be trusted since their manipulative use of the law indicates they lack good moral character by attempting to subjugate society to the economic interests of the legal profession. I recommend their removal from the bench and disbarment with permission to apply for reinstatement in five years upon a showing of remorse and rehabilitation. And as you know, my standard of candor and materiality is lenient compared to that applied by the State Bars.

NEW JERSEY

104 A.2d 609 (1954)

A FULL DISCLOSURE OF ONE'S PERSONAL LIFE

This case is an attorney discipline action. It exemplifies the State Bar's irrational mindset regarding the admissions process, which is best summarized early in the opinion as follows:

> **"A full disclosure of one's personal life and his affairs should be made by every prospective candidate. . . ."**

After the Respondent was admitted, it was discovered that during the admissions process he did not disclose his past criminal record. The problem was that the application form did not inquire into whether one was ever convicted of a crime. The Court adopted the irrational expectation that an Applicant should disclose something about which an inquiry was never made. The opinion states:

> **"While the question does not specifically ask whether or not the applicant has ever been convicted of a crime,** there can be little doubt but that the respondent knew **its implication**. . . .
>
> Parenthetically, it might be well that **in the future the direct question** of whether or not the applicant has ever been convicted of crime **should be asked**. . . ."

The question in my mind is that if the "implication" is so clear, then why was it necessary to ask the question directly in the future? The answer is obvious. It was necessary to ask the question directly in the future because the Court's logic was flawed when it suggested there was little doubt of the "implication." **The simple fact is that there was <u>substantial doubt</u> about the "implication." If you want to know something, you ask it directly. It is unfair to expect an Applicant to read into the mind of the Bar Committee.** The Court then states:

> "The fact that respondent had been convicted of a crime is not the most serious aspect of this case. It is the fact of his non-disclosure . . . ."

How can you rationally fault the guy for non-disclosure of a question never asked? Furthermore, even if the question were asked, it is the conviction which would be most serious. I believe the public is more concerned about the nature of crimes our attorneys are convicted of, rather than the way they answer application questions. **Does the Court suggest that an individual convicted of armed robbery who discloses it, has better moral character than an individual who doesn't disclose a speeding ticket? The nature of the crime convicted is the prime issue. The issue of nondisclosure is secondary.** Nondisclosure of criminal convictions, I do believe is grounds for denying admission, but only when the direct question is asked. The Court notwithstanding its assertions of an "implied" duty of disclosure, even in the absence of inquiry, recognizes the weakness of its logic when imposing discipline. It states:

> "This is the first disciplinary case of its kind which has come before us and our disposition of it must serve as a salutary warning to all future applicants for admission to the bar. With this warning **those transgressing in like manner can expect nothing short of disbarment.**
>
> The judgment of the court is that the respondent be **suspended form the practice of law for a period of two years . . . ."** [295]

The Court in no uncertain terms stated that it believed disbarment was the appropriate sanction, but then simply suspended the accused. It did so on the ostensible ground that this was the first case of its nature. It is obvious however, that the real reason was because in the future direct inquiry about convictions would be made expressly, rather than through inquiry by "implication."

462 A.2d 165 (1983)

BROKEN RULE

The Applicant while in law school was allegedly involved in a fraudulent investment scheme although no charges were ever filed and he was never convicted. After investigating, the Character committee certified his admission. The Court "sua sponte" decided to review his character certification. The Applicant contended that the Court could not conduct a review after his certification by the Committee, since it had no rule or procedures in place for such a review. The Court nevertheless proceeded and its' opinion addressed the issue as follows:

> "At the outset, we must address . . . contentions that the Court is foreclosed from conducting a definitive review of the merits of his case. He asserts initially that the Court has no legal authority to withhold certification. . . . <Applicant> argues that under R.1:27-1 *fn6 the Court has delegated the examination of a bar applicant's character to the Committee . . . and is bound to admit those applicants whom the Committee has certified as possessing good character. . . . <Applicant> also suggests that the regulations governing the Committee on Character, approved by this Court, . . . provide for appellate review by the Supreme Court only when certification has been denied by the Committee on Character. . . .
>
> We reject this contention. . . . This constitutional authority cannot be delegated in their entirety to the Board of Bar Examiners. . . . **Although the current rules do not define a formal procedure for cases like <Applicant>, the Court has inherent jurisdiction to review any determination concerning an applicant's fitness to practice law. . . .**
>
> **. . .**
>
> Finally, <Applicant> claims that he was denied procedural due process because the order to show cause does not adequately indicate the grounds upon which the applicant's fitness was to be reviewed. At oral argument, however, counsel conceded that he was fully aware of the issues in dispute . . . ."

Rule 1:27-1 read as follows:

> "(a) Qualifications for Licensure. No person shall be admitted to the bar of this State unless the following shall first have successfully occurred in the manner prescribed by the rules of the Board of Bar Examiners :
>
> **. . .**
>
> (2) Certification of good character by the Committee on Character . . . ;
>
> **. . .**
>
> (b) Report of Board to Supreme Court. The Board of Bar Examiners shall report to the Supreme Court the names of those applicants whose qualifications accord with these rules. **The Supreme Court shall then admit such applicants . . . ."**

The Applicant was absolutely right. **In order to review his application, the Court had to violate its own rule.** The written rule imposed a legal duty upon the Court to admit him. The operative term in the Bolded passage above is "shall." The rule was poorly written and obviously should have provided for judicial review, but the fact is that it didn't. One other aspect of the opinion requires mentioning regarding the Right-Privilege dichotomy. The Court states:

> "This Court has consistently held bar membership to be a **privilege** burdened with conditions. . . .This requirement was outlined in New Jersey well over a century ago, On

Application for Attorney's License, 21 N.J.L. 345 (Sup. Ct. 1848) . . . ." [296]

To the extent the Court relied on the above cited case, their interpretation was logically flawed since the 1866 U.S. Supreme Court case of ***Ex parte Garland***, trumps any 1848 New Jersey case.

467 A.2d 1084 (1983)

EXPUNGEMENTS APPLY TO OTHER BRANCHES OF GOVERNMENT, BUT NOT THE JUDICIARY

The Applicant was arrested and charged in criminal actions which were dismissed. He was also a party in numerous lawsuits. He submitted two certified statements to the Bar denying the criminal and civil actions. In a third certified statement he still failed to disclose one arrest. Initially, a subcommittee of the Committee on Character concluded he was not fit to practice law, but subsequently the Committee determined he was remorseful and certified him. The Board agreed. The State Supreme Court reversed certification.

The lawsuits involved a 1976 and 1977 action in which he successfully opposed termination of his parental rights and adoption of his son by a stepfather, a 1977 suit concerning visitation and support, a 1978 suit in which his fiancé sued for injuries sustained while a passenger in a car he was driving, possession of a diseased animal, a tenancy complaint, a suit for insurance proceeds, and as Administrator in a survival action.

He claimed he did not disclose the arrests resulting in dismissals because he was not guilty. As a reminder to the reader, a basic predicate purportedly incorporated within our legal system is that one is "innocent until proven guilty." If such be the case, then why would an Applicant have to disclose matters which impute no guilt? With respect to one of the incidents he claimed that he was expressly advised by the Public Defender that after completion of a Pretrial Intervention Program the matter would be "void ab initio" and he would not have to disclose it. The Public Defender denied giving such advice.

The Committee noted that even if an expungement or sealing order was entered, disclosure was required. Apparently, the Committee was of the irrational notion that the State Bar had a special exemption from an Order of expungement. Expungement in their view only protected an individual with respect to agencies under the Legislative and Executive branches. The Applicant also had four motor vehicle citations, and warrants for his arrest had been issued with respect to such. After he was stopped by police however, it was determined that he had paid the citations. The Court states:

> ". . . **Unless evidence of unfitness is clear and convincing, any lingering doubts are resolved in favor the applicant** and his or her admission to the bar. . . .
>
> The heart of <Applicant's> misconduct is not his possible involvement in embezzlement, forgery, or larceny. Given the lapse of time, it is impossible to determine the truth of these charges. We are concerned therefore solely with <Applicant's> complete and continuous lack of candor to the Committee and the Board.
>
> **. . .**
>
> The Committee finds that . . . falsely supplied the answer that his employment had been terminated with the State in order to return to school, with a purpose of concealing the fact that the State had terminated his employment either because of excessive absenteeism or because of an alleged embezzlement.
>
> **. . .**
>
> **. . . We have long and firmly held that "there is no place in the law for a man or woman who cannot or will not tell the truth, even when his or her own interests are involved. In the legal profession, there must be a reverence for the truth. . . ."** [297]

Read the last paragraph above again. As an individual reading it, how should it be viewed in light of the prior case discussed? The Court here states that "there is no place in the law" for one who

does not tell the truth even when there own interests are involved. In the last case however, they had a Rule that stated : "The Supreme Court **shall** then admit such applicants . . . ." But, since the Court didn't like the result of the rule in that case, they didn't do what they said they would.

I would admit the Applicant in this case. The inquiries into arrests resulting in dismissals and civil actions as a whole, are unconstitutional. **Nondisclosure of a constitutionally infirm question results in what can fairly be phrased as an "ethical wash."** The question should not have been asked. The result being that both the question and the answer should not be considered.

524 A.2d 813 (1987)

IF YOU LIE, THEN YOU MUST BE TELLING THE TRUTH

This was a disciplinary action asserting that when an attorney applied to the Bar, he misrepresented that he had not been:

> "disciplined, reprimanded, suspended, expelled or asked to resign from any educational institution."

The second paragraph in the opinion reads as follows:

> **"Apparently, the Committee had misplaced the law school certificate known as Form #3 that is part of the application for admission to the bar. . . . Through an oversight, the Committee certified that respondent was fit to be admitted to the bar, and he was admitted on December 20, 1984."**

As I read the above paragraph, my first thought is that no matter what the Applicant did, the Committee was on awfully lame ground trying to revoke an admission that occurred due to their own screw-up. It is also interesting to me that the Committee's "oversight" is characterized as inadvertence, while Applicant errors are typically characterized as "misleading," or "lacking in candor." The Applicants are certainly not given the liberality of construction, afforded to the Committee.

The Court revokes his law license, notwithstanding the obvious embarrassment the situation presents them with. In so far as the substance of the character issue goes, the Applicant did two things. First, he falsely stated on his law school application that he was a member of a minority to improve his admission chances. Second, while in law school, he apparently falsified his résumé and included a law school transcript that inflated his grades, to get a job. The law school administration found out and he signed an agreement that included the following provision:

> "in consideration of the Law School of the University of Pennsylvania's **refraining from bringing a Disciplinary Proceeding** against me, **agree to withdraw** from the Law School . . ."

He was not suspended. He was not expelled. He was obviously not disciplined since the agreement specifically stated:

> "in consideration of . . . refraining from bringing a Disciplinary Proceeding"

He withdrew. His withdrawal does appear to fit within the language of the admissions question that reads, "or asked to resign." The NJ Committee sent Form 3. It included the above inquiry to St. Louis Law School which the Applicant attended after leaving Pennsylvania. St. Louis Law School disclosed the information on the Law School Certificate. The problem was that the Bar Committee lost the certificate. The opinion reads:

> "This material had been received by the Committee on Character administrative office on June 11, 1984 but apparently was misplaced. **Respondent was informed by the Committee on Character in late October 1984 that if the required information was not received, he would not be certified for admission to the bar. . . . On October 22, 1984 the Committee on Character certified that respondent was fit to be a member of the bar.** When respondent received word that he would be sworn in as a member of the bar, he assumed that the dean . . . had sent in all the information. He was admitted to the bar of this state on December 20, 1984."

Now, you have a second embarrassing screw up. First, the Committee misplaced the Certificate. Next, they expressly told the Applicant that he would not be admitted if it wasn't received, and then they admitted him anyway. These are instances of the Bar not diligently processing an application.

At the Hearing, the Respondent insisted his negative answer to the question was correct. He contended that his was a voluntary withdrawal. Neither the Court, nor myself agree. The agreement he executed fell within the scope of the portion of the question that read, "or asked to resign." The Respondent further contended that even if his answer was wrong, it was not an effort to deceive the Committee. The opinion states with reference to such:

> "Respondent stated he had filled out the application and left that particular question blank for about two weeks. . . .
>
> . . . He anticipated that the committee, having received the information from St. Louis, would then have conducted a hearing regarding his character. . . . Since respondent was certain St. Louis would furnish the adverse information to New Jersey, he did not signal his answer to this question with an asterisk and a brief explanation.
>
> . . . Respondent believed that one of the purposes of the agreement he signed . . . was to enable him to answer negatively a question such as the one at issue. . . ."

The issue on intent to deceive is close. The Respondent is contending that he wasn't certain for a time how to answer the question. He had doubts. He was fairly certain that the law school would answer affirmatively, but he appears to have had a good faith belief (albeit an incorrect one) that it should be answered in the negative. His explanation is reasonable and I would rule in his favor on the issue of intent to deceive. It is a close call though. The Court relies in part on the most disturbing sentence in the first New Jersey case I discussed (**104 A.2d 609 (1954)**). It states again in 1987:

> **"A full disclosure of one's personal life and his affairs should be made of every prospective candidate** and it can be generally stated that there is no place in the law for a man who cannot, or will not, tell the truth even when his own interests are involved."

Full disclosure **of one's personal life and affairs**, is none of the State Bar's business. In so far as the aspect of truth goes, if an Applicant is scrutinized under the strictest definition possible, the Committee should be also. The Committee would not pass muster under such scrutiny. They specifically informed the Applicant in "late October 1984 that if the required information was not received, he would not be certified . . . ." They expressly stated they would not certify him, but did so anyway. This fact however, the Court does not find to be lacking in candor, but rather chalks up as an honest mistake.

The rule one is left with is simple. Applicant misstatements are lies, but Character Committee misstatements are merely inadvertent errors. After giving the Committee the benefit of the doubt, the Court had an ethical obligation to give such benefit to the Respondent. He answered the question

incorrectly, but his explanation was reasonable. The bulk of the mistakes in this case rest with the Committee. The Court makes one other statement worth noting, when it closes as follows:

> **"A defense that a fairly detailed question did not precisely embrace his particular factual situation does not excuse a fundamental requirement** that he be as truthful and candid as possible." [298]

I disagree. The Court's assertion is incorrect. One does not have a constitutional, moral or ethical obligation to answer a question that is not asked. In fact, one who does so would be a bad lawyer. If a particular factual situation is not embraced within the question, logic mandates that the question may be answered in the negative.

This author asserts that the exact opposite of what the Court suggests, embraces the truth. **Answering a question affirmatively that is not covered by a particular factual situation, is what would constitute a lack of candor. If the factual situation is not embraced by the question, then an affirmative answer would be a misstatement. The Court's reasoning results in the absurd conclusion that one has an affirmative duty to misstate the truth, by answering affirmatively to questions not covered by particular factual situations. If you lie, then you're telling the truth.**

577 A.2d 149 (1990)

HOW TO CONTROL A LAWYER

In the last case, the Court did not accept as credible the Applicant's explanation for answering a question "No" that was unrelated to criminal conviction. In that case, he executed a written agreement with his law school that could reasonably be construed to suggest a negative answer was appropriate. I indicated myself, the correct answer was "yes," but the reasonableness of his explanation, coupled with the Committee's own mistakes should have absolved him from a finding that he intended to deceive.

In this case, the Court likes the Applicant. As a result, it accepts as credible his explanation for incorrectly denying that he was charged with fraud, on the ground that he "misread" the question. The Court states:

> "**We also accept as fully credible respondent's explanation** that he had denied being charged with crimes involving fraud and larceny **because he had misread the question** on the Certified Statements as addressing criminal convictions by a controlled business enterprise. . . ."

While I agree with the Court's decision on this issue, it is inconsistent with their stance in the prior case. The public is left with an unreliable body of case law pertaining to admissions, that appears predicated on the "grace and favor" of the State, in violation of *Ex parte Garland.*

The Applicant in this case was convicted of several crimes committed between 1969 and 1971. In 1970, while in high school he was convicted of possession of a dangerous weapon, larceny and defacing property. He was sentenced to probation. Despite his substance abuse and convictions, he achieved remarkable academic success and was awarded a full scholarship to Brown University. While at Brown, he drank alcohol five to seven times a week, smoked marijuana, and used heroin. To support his drug habit, he stole from fellow students. He was then convicted of breaking and entering, assault with a dangerous weapon, and intent to commit larceny. He was suspended from school. At this point, based on the court's opinion he appears to have six serious criminal convictions. The Applicant in the prior case was never convicted of a crime.

In 1971, the Applicant in this case was arrested and charged with possession of a narcotic drug. Prior to trial he fled and remained a fugitive until 1977 when he surrendered. He pled "nolo contendere" which is essentially the equivalent of a guilty plea. He received one year of unsupervised probation. In 1978 he enrolled at the University of Iowa and received a bachelor's degree in 1981. While a student there, he drank alcohol four to five times a week and smoked marijuana regularly. Subsequently, he enrolled in Rutgers University School of Law. His law school years were similarly marked by drug and alcohol abuse including the use of cocaine, and poor academic performance. He graduated from law school in 1984. During the Bar hearings the following exchanges took place:

> Q. Have you ever been addicted to, or received treatment for the use of narcotics, drugs, or intoxicating liquor?
>
> A. No.
>
> Q. Have you . . . ever been charged with fraud, larceny, embezzlement, . . . or similar offenses . . .?
>
> A. No.

In 1985, he was arrested for possession of cocaine and narcotics paraphernalia. He did not immediately notify the Character Committee. The charges were dismissed. According to the Applicant, the 1985 arrest was the final "jolt" that made him realize he suffered from substance abuse. From August, 1985 to April, 1987 (approximately 1 ½ years) he was drug free. The Conference Panel unanimously recommended that certification be withheld. Concern was expressed for his lack of candor, misleading and deceiving demeanor and lack of repentance. It further concluded that he possessed a **"personality flaw."** A Review Panel conducted Hearings in 1989. Two members recommended that he be certified, subject to the following conditions for three years:

1. He may engage in the practice of law only as a partner, shareholder, associate or employee of at least one other member of the Bar.

2. He attend at least one meeting per week of Lawyers Concerned with Lawyers and five meetings per week of Alcoholics Anonymous.

3. He undergo and bear the expense of random urine testing

4. He submit quarterly affidavits to the Committee

The Court grants admission, subject to the above conditions. I have major objections to their decision. I would not admit this Applicant. He has been convicted of at least six serious crimes. His rehabilitation began only after he filed his Bar application, which concerns me. I would disregard the 1985 arrest, since the charges were dismissed. Such being the case, over a decade has passed since his last conviction. The time lapse since his last conviction is sufficient. The problem is that there is virtually no evidence of rehabilitation during any period when a Bar application was not pending. I am concerned that the evidence of rehabilitation that does exist, was intended for the sole purpose of attaining membership in the Bar, at which point he will revert to his old ways.

The concern I have expressed, is obviously a concern the Court has also. That is why they admitted him subject to very stringent conditions. And that is my second objection. You're either in the Bar or you're not. To admit someone, and then hold a gavel over their head is garbage. How could this Applicant possibly be a zealous, passionate, aggressive attorney knowing that if he makes one false move, he'll lose his license? The State Bar owns this Applicant's soul as a result of the conditions they imposed. And that's what they wanted.

They have acquired the substantive ability to control many aspects of his lifestyle and therefore, the manner in which he litigates. My primary focus here is not so much on the Applicant, but the result it has on his clients (the litigants). The Court seems to forget them. How will a client feel if they learn that their lawyer is subject to licensing conditions that opposing counsel is not subject to? He has no ability to be aggressive with opposing counsel in a case. Opposing counsel has leverage over this lawyer, and therefore has leverage over this lawyer's clients. The guy's license is hanging by a thin thread.

The conditions are crap. State Bars are regulatory agencies, not babysitters. You're either in or you're out. You don't give someone a pseudo-admission for the purpose of controlling their lifestyle, conduct and litigation. The decision itself in the case is close. Both the Court and myself agree that there are problems with admitting this Applicant immediately. Both the Court and myself agree that within just two or three years if he stays on the right path, he should be a licensed attorney without conditions attached. The Court and I depart however on the concept of conditions. In the interest of protecting the ability of litigants to hire aggressive, passionate, zealous counsel the concept of admitting someone subject to conditions that other attorneys are not subject to is absolutely unacceptable. Control the lawyer, and you control litigation outcomes. That's what the Bars seek to accomplish.[299]

1996.NJ.216 (VERSUSLAW) (1996)

THE JOKER

This case exemplifies how the Bar punishes Applicants for their attitude, which carries with it the requisite corollary that they are being punished for their beliefs and opinions in violation of the First Amendment. In this case, the Applicant may or may not have disclosed, a 1985 arrest for larceny. Whether he disclosed it became an issue of dispute. In any event, the opinion indicates the incident did not result in a conviction. When confronted with the alleged nondisclosure, the Applicant requested a copy of his application. This mere request contributed to the Committee's ultimate decision, as the Court states:

> "<Applicant> requested a copy of his application papers because he had not kept one, even though all candidates are instructed to save a copy for their records."

He then sent the Committee an affidavit in 1994 with a one-page attachment claiming that he originally submitted information pertaining to the arrest. It appears his request for a copy of the application was not based upon his failure to maintain a copy, but rather an attempt to determine whether the Committee had lost the attachment.

It should be recalled that in **524 A.2d 813 (1987)**, the Committee had misplaced a law school certificate. The Court there determined such to be mere inadvertent error. They are obviously therefore, in no position to chastise the Applicant in this case for either inadvertently failing to keep a copy of the application, or inadvertently failing to submit an attachment. Particularly, since he may have submitted the attachment which the Committee might have lost.

It is further noteworthy that the records pertaining to the undisclosed arrest were claimed to be under seal. Such being the case, the Committee probably was not even legally entitled to them. In support of his contention that the attachment pertaining to the arrest was submitted and then lost by the Committee, the Applicant claimed that when he prepared the attachment he showed it to various individuals. He produced two witnesses who testified they had seen or heard about the substance of the attachment. The Committee noted there were stylistic and formatting differences between papers submitted with the original application and the arrest attachment. They were suggesting he prepared the attachment on a post hoc basis.

The Applicant did disclose a 1994 Hoboken arrest for disorderly conduct that was dismissed. The facts according to the Committee were as follows. The Applicant was on the front steps of the Hoboken Police Department around 2:30 a.m., early Sunday morning accompanied by friends, waiting for another friend who had been arrested earlier. He was intoxicated and using abusive language. He had apparently been out partying on a Saturday night with his friends. Upon being asked to leave and after refusing, he was arrested.

The Applicant's explanation was that the incident began when he launched into a monologue consisting mainly of jokes about police officers and donuts. He stated as follows:

> "**<a> few minutes later, when I was nearing the apex of my comic ability, Detective . . . approached me** and told me to take my comedy act somewhere else."

The Committee found that his characterization of the arrest as a "peaceful political protest" was disingenuous. This is notwithstanding that the trial court ruled the charge against him was unconstitutional. The next area of attack that the Committee focused on, involved purportedly improper dealings with his auto insurer. The Applicant registered two cars using his parents' address in New York, even though he lived in New Jersey. During 1993, his auto license was suspended for

nonpayment of insurance premiums and suspended again in 1994 for operation of a vehicle without insurance. No arrests or convictions resulted.

In summary, he had two arrests, and no convictions. One arrest was definitely disclosed. The other arrest may or may not have been disclosed. He was denied admission. Why? He is denied admission for one primary reason. He was a smart aleck. No smart alecks in the legal profession. The opinion states:

> "<Applicant's> responses were intemperate and inappropriate; the content and tone of his communications were **sarcastic, flippant, and snide; his attitude condescending and disrespectful.**
>
> An example relates to the panel's concern about the differences between . . . the attachment to the Candidate's Statement and that of the subsequently-submitted document explaining the 1985 Brighton arrest. . . .
>
> > <Candidate>: They are the exact same--we can carbon-date them if you would like, . . .
> >
> > <Panelist. . .>: I assume you are being facetious.
> >
> > <Candidate> : I was being facetious.
>
> The record reveals another instance when the candidate was impatient and snide with the panel members. . . .
>
> > <Panelist . . .> : . . . have you ever abused alcohol subsequent to that time?
> >
> > <Candidate > : In what respect abused alcohol?
> > . . .
> > <Candidate > : I have never attempted or been asked to touch my nose while drinking, that would not be the point. However, I would certainly concede that on occasion I perhaps would not have been able to touch my nose accurately, if asked to do so. As well, walking a straight line, I would probably -- probably there have been times, and if you are asking, . . . yes, guilty as charged."
>
> As these exchanges indicate, **the candidate acted as if the panel's questions were amusing, irrelevant, or unimportant**. . . . Nor does his apology following the offer to "carbon-date" his submissions appear to have been genuine: he later characterized that exchange as follows: <a>t this point <I> was interrupted and roundly chastised by Panelist . . . for having introduced science into the realm of rank speculation, and was never given the opportunity to expand upon his explanation." **His correspondence with court personnel** following the hearing provides more extreme examples of **sarcasm, flippancy, and inappropriate responses** about certain matters. **For example, <Applicant>, complaining of delay, described . . . the Assistant Secretary of the Board of Bar Examiners, as . . . "either a liar or an incompetent, perhaps both," adding "<t>hough Christian charity demands that I resolve my doubts in <Secretary's> favor, and simply attribute his inaction to mere sloth and an ability deficit, I suspect that his torpor is motivated by ill-disguised hostility towards my application."**

In response to his correspondence, the Clerk of the Court sent a letter to him that stated:

". . . I set your correspondence aside for a time to allow first impressions to fade. I wanted to be able to respond to the merits of your request and not the hyperbole and intemperate remarks that clouded the otherwise reasonable basis for your inquiry; that is, the amount of time it was taking to resolve your matter before the Committee."

He then wrote back as follows:

"I acknowledge your assurance that . . . Committee members have no "interest in delaying the process." Nevertheless, the implication that my suspicions were unwarranted is as untenable as the statement that "the Panel members wish to resolve this matter as expeditiously as possible" is comical.

. . .

. . . I accept your tacit apologies for the delay and anticipate that you personally will act to see this disgraceful affair through to its conclusion in an expeditious manner. Further I expect that you will promptly advise me of an anticipated date of completion, and that you will cleave unto that date with a resolve that rivals <Panelist> unwavering commitment to lethargy.

. . .

How's that for intemperate hyperbole?"

The Court states as follows:

"**We note at the outset that the candidate protests that he is not yet an attorney and thus must be judged as an average person**, not by the standards imposed on the members of the Bar. . . . The argument is fatuous. . . . Good character does not emerge on licensure. It is absurd to suggest that good character is not revealed until a person becomes an attorney.

. . .

Lack of candor is also reflected by the candidate's disingenuous characterization of the Hoboken disorderly persons arrest. Although the panel found that the 1994 arrest for disorderly conduct was a "minor incident," the panel was disturbed by the applicant's attempts to glorify the incident as a "free speech" matter. This Court recognizes that the statute under which <Applicant> was first charged was unconstitutionally broad. However, to characterize the conduct that led to the arrest as a "peaceful political protest" is a transparent deceit. . . .

The basis for this Court's concern is not the gravity of the misconduct that led to . . . arrest. <Applicant's> own moving papers in the original proceedings indicate that was engaged in police-baiting. It is his self-serving statement that his conduct was a "peaceful political protest" that is inaccurate and misleading. This description was intended to camouflage the unflattering incident. . . .

. . .

In this case, the instances of duplicity are more than isolated occurrences; rather, they constitute a pattern of behavior that demonstrates a clear and convincing lack of "reverence for the truth." . . . **Though each episode of dishonesty or lack of candor is not particularly egregious, taken as a whole**, the pattern reflects insensitivity and indifference to the need for full and accurate disclosure. . . .

. . .

The . . . <Applicant> argues a "lack of notice" with regard to the consideration of his **demeanor** in his dealing with the Committee Panel and other court employees. That contention lacks merit. . . . <Court> **opinions clearly teach that the "applicant's attitude as expressed in**

hearings before the Board of Bar Examiners and any reviewing courts" will be a factor in determining the candidate's present fitness. . . .

. . . He denigrated inquiries into substance abuse. . . . He treated dismissively observations and comments by panel members intended to elucidate their inquiry. Also, **he twisted** highly relevant questions seeking the truth . . . . **compared the panel to the infamous inquisitor, Torquemada, and characterized the proceedings as a "ritual slaughter" and a "pharisaical inquiry". . . .**

. . . We have previously noted that :

Contempt comprehends **any act** which is calculated to or tends to **embarrass**, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its **dignity**; . . . or which otherwise tends to bring the authority and administration of the law **into disrepute** or disregard. In short, **any conduct is contemptible** which **bespeaks of scorn** or disdain **for a court** or its authority.

. . .

In . . . we recognized a "**requirement that lawyers display a courteous and respectful attitude** not only towards the court, but towards opposing counsel, parties in the case, witnesses, court officers, clerks--in short, **towards everyone and anyone who has anything to do with the legal process." . . .**

. . .

. . . Respect for and confidence in the judicial office are essential to the maintenance of an orderly system of justice. . . ." [300]

There are additional comments the Court makes along the foregoing lines, but I believe the point is adequately made. My own comments on this case, are brief. The case involved a smart-aleck. He wasn't a bad guy. He was just a comedian, more or less. He is a man that I also believe, has now lost a great deal of faith and confidence in the legal profession. The Court took someone who was essentially a law-abiding citizen and instilled a reason to completely abandon faith in the American system of justice.

It based its opinion on the need for respect and confidence in the judicial office. Respect however has to be earned, and can never be demanded or it's not genuine respect. I sadly believe the Court diminished, rather than built respect for the Judiciary in this case. No one that has ever unconditionally demanded respect has gotten it, but rather instead such demands typically result in a loss of such.

In so far, as it's characterization of contempt, I do not agree with the Court and believe their irrational definition cuts directly into First Amendment protections. To accept their definition, would result in the immediate arrest and conviction for contempt of literally thousands of on-stage comedians, actors and actresses. Their definition did not limit alleged contemptuous acts to those committed in the presence of the Court. Rather the Court's definition was:

"**any conduct is contemptible** which **bespeaks of scorn** or disdain **for a court** or its authority."

I assume the Court's failure to limit such matters to those which occur in the presence of the Court was merely inadvertent error. But such being the case, let the Bar applicant have the same liberal construction or better yet, as I suggest, don't ask questions unless they are completely objective in nature and address the most "material" aspects of character.

1998.NJ.42048 (1998)

The Applicant's Certified Statement for admission disclosed civil suits, child support arrearages and what the Court phrased as "**intemperate interaction with the New Jersey Board of Bar Examiners**." It is another example of wrongful admission denial based on "attitude" assessment. The opinion states:

> "In determining that <Applicant> was unfit to practice law, the Statewide Panel relied on findings that the candidate had made insufficient efforts to reduce arrearages of $ 14,000 in child support; . . . had **demonstrated disrespect** for judicial personnel, procedures; and institutions **by engaging in a course of litigation challenging bar admission procedures; . . ."**

It is noteworthy that even in the Arizona case **555 P.2d 315 (1976)** discussed herein (the Ronwin case), the Court declined to hold that the institution of litigation against the Bar, in and of itself constitutes a deficiency in character. It is most imprudent ground for the Judiciary to determine otherwise, as such cuts directly into the citizen's right to redress grievances by resort to appropriate legal process. That right is a cornerstone foundation of American values and constitutional principles. The Court's opinion states further:

> "Although his credit litigation may have been justified, his **intemperate exchanges** with Bar Examiners personnel and his litigation against the Bar Examiners and his law school demonstrated an unwillingness to accept any personal responsibility for his difficulties. . . . In one letter to the Secretary of the Bar Examiners, **<Applicant> characterized all communications with the Bar Examiners as "marked by petty cruelty." He added that a court order compelling him to pay the examination fee was a "fraud and deceit," and that the Bar Examiners had committed acts of "purposeful harassment and cruelty. . . . His suit against the Bar Examiners exhibited a callous disregard for the rights of others. . . . <Applicant> filed three separate federal suits, one of which sought injunctive relief to strike down the requirement of passage of a bar examination as a prerequisite for a license to practice law.** These bar-related suits were all summarily dismissed by federal and state courts." [301]

His admission is denied. The reason is clear. He instituted suit against the Bar.

SUPREME COURT OF NJ, No. E-110; Versuslaw 2000.NJ.0042443; (2000)

THE BAR WAS RIGHT, YOU LACK GOOD MORAL CHARACTER
(Psst: Don't Worry, We're Really Admitting You)

You can obtain an immense amount of information simply by looking at the date on which a Court opinion is issued. This case is nothing more than ridiculously amusing.

The Applicant was a licensed Massachusetts attorney who placed his license on "inactive" status while working for a very large and purportedly prestigious New Jersey law firm as a Senior Associate. He was a graduate of Harvard Law School. He was working in the Acquisitions and Mergers department of the New Jersey firm, handling general corporate matters, under the direction, supervision and control of licensed New Jersey attorneys. He applied to sit for the New Jersey Bar exam in 1992, but as the exam date approached was informed by the firm's managing partner that there was no particular necessity for him to take the bar exam in New Jersey in order to practice corporate law in New Jersey.

The information given to him by the firm's managing partner was false. He was also "politely" requested not to take the February bar exam, because the firm was preparing to close an unusually large transaction for which his services would be required. Accordingly, he withdrew from sitting for the 1992 exam. He worked for the law firm from 1991 to 1998, at which time he left for a firm in New York. In July, 1999 he sat for the New York and New Jersey Bar exam. The New Jersey Bar concluded that for the seven year period of 1991 - 1998, he had engaged in the Unauthorized Practice of Law which rendered him morally unfit for character certification.

The Court realized that the issue of interstate practice and multi-disciplinary practice is an extremely complicated one, particularly as it affects the anti-competitive issue of the Unauthorized Practice of law. What the Court did was amusing. They affirmed the Bar's decision, but wrote as follows:

> "With regard to <Applicant's> application for admission, we agree with the Committee on Character that <Applicant's> earlier failure to abide by the details of our admission and practice rules reflected negatively on his fitness to practice. . . .
>
> . . .
>
> We note that <Applicant's> application to be admitted to the bar in New Jersey has been pending since the July 1999 bar examination. The delay in his certification should underscore to this candidate the seriousness with which we view his earlier improper practice. . . .
>
> . . .
>
> The Court adopts the recommendation of the Committee on Character that certification . . . be withheld, **but . . . . the Committee's recommendation is modified to permit <Applicant's> certification . . . effective January 2, 2001."** [302]

The Court as a matter of substance, knew the Bar was on an exceptionally weak ground by denying admission on moral character grounds in reliance on a lame allegation of engaging in UPL. Nevertheless, as a matter of form they wanted to provide justification that the Bar was right.

So what they did was issue an opinion on December 1, 2000 that denied moral character certification, but then allowed such certification on January 2, 2001 (a mere one month later). The end result being that as a matter of substance the Applicant acquires the character certification he needs for admission, and the State Bar as a matter of form acquires the egotistical "win" that it wanted. It's a rather ridiculous opinion, that is more amusing than anything else.

You can obtain a lot of information just by looking at the date of a Court's opinion.

NEW MEXICO

646 P.2d 1236 (1982)

IT'S NOT A TOPLESS BAR

The Applicant was denied admission on character grounds based on information disclosed on her application pertaining to several arrests. She had one conviction that was reversed on appeal, for conspiracy to transport stolen securities interstate. The conviction was reversed in 1971, eleven years prior to the Court's opinion and approximately eight years prior to her application. In 1975, she was arrested and charged with conspiracy to sell heroin. The opinion does not indicate that she was convicted. In 1979, she was arrested twice for dancing nude (apparently in topless bars). In 1979, she was also arrested for driving while intoxicated and possession of drugs. The charges were dismissed.

In sum, it appears she had five arrests, and her only conviction was reversed on appeal. The arrests focused on drugs and topless dancing. The Bar Panel concluded in regards to the 1975 arrest, that even though the charges were dismissed, she was culpably involved. In essence, they reached their own little verdict, notwithstanding that the matter was dismissed by the Court.

Based on their conclusion, they further surmised that her characterization of the 1975 arrest, constituted a failure to testify truthfully and candidly. An interesting concept. The charges are dismissed. The Bar then not only determines the Applicant was guilty, but further contends their characterization of the incident was untruthful. **The logical flaw in such reasoning is that it leads to the inescapable conclusion that the Bar Panel believes the Court let a guilty person go free. The Bar therefore exhibits an immense lack of faith and confidence in the justice system, when it determines on its own that a person is guilty even though the charges were dismissed.** The Court makes two general statements about the standards to be used in assessing Bar applications which are:

> ". . . A particular case must be judged on its own merits, and an **ad hoc** determination in each instance must be made by this Court. . . .
> **. . .**
> . . . **Reasonable doubts are resolved in favor of the applicant."** [303]

The phrase "ad hoc" is demonstrative of the arbitrary nature of Bar admission proceedings. The concept that reasonable doubts are resolved in favor of the Applicant is contradictory to the legal predicate that the burden of proving good character is on the Applicant, rather than the Bar. In any event, it is a concept that certainly wasn't applied in this case. They denied admission to an individual whose only conviction was reversed. She therefore has a clean record from a legal perspective when principles of law are applied correctly. The Applicant should have been admitted.

NEW YORK

97 A.D. 2d 557; 467 N.Y.S.2d 289 (1983)

NO TOPLESS DANCERS, SMART ALECKS, OR COMEDIANS, OH, YOU'RE A THIEF, COME ON IN

You can't be a topless dancer, a smart aleck, comedian or have a bad attitude and demeanor. You can however, steal money from your clients as this case demonstrates. The Applicant was admitted to the North Carolina Bar. In 1982, he was given a private reprimand by the North Carolina State Bar. While a partner in a law firm, he received a check for $ 6,400 in connection with the claim of a client. Instead of depositing it in a trust account, he used the money to pay personal debts. He then did the same thing with funds received on behalf of another client. After admitting his acts, he replaced the converted funds. The New York Court grants admission. Their opinion states:

> ". . . We do not condone the serious and regrettable violations of the Code of Professional Responsibility evinced by petitioner's conversion of client funds in the State of North Carolina. Nor do we take lightly our responsibility to ensure that those admitted to the Bar of this State possess the character fitness required for the practice of law. . . . In this case, however, we prefer to focus on certain mitigating factors clearly evident from the file. First of all, with regard to his misconduct in North Carolina, petitioner confessed his defalcations to his partners and promptly made restitution. He then reported his actions to the North Carolina State Bar and cooperated with that body in its investigation of the matter. . . ." [304]

Frankly speaking, I would admit this Applicant also. He made a mistake, owned up to it, and made restitution. He was never arrested or convicted of any crime. My determination however, is in accord with the objective standard I apply consistently. The Court's conclusion while correct in the instant case, is inconsistent with other cases, where admission is denied based on attitude, beliefs etc.. The inconsistency demonstrates why an objective standard is needed.

135 A.D.2d 57 (1988)

This case is a disciplinary proceeding. The Applicant was admitted to the New York Bar in 1985. A disciplinary proceeded was instituted on grounds that he failed to disclose a material fact in his application for admission. The opinion is short and I address only one aspect. The second charge, alleges he failed to disclose employment at a law office during 1983 and 1984 while a law student. I do not believe where one is employed is "material" to consideration of character. Nor do I believe their conduct as an employee is relevant, unless of a sufficiently egregious nature that it results in a criminal conviction. Such convictions would obviously be covered by the question addressing convictions. Since the information requested is not "material," the failure to disclose does not warrant discipline. [305]

549 N.E.2d 472 (1989)

THE BANKRUPTCY OF JUDICIAL REASON and LOGIC

The Applicant had filed for bankruptcy. He was denied admission to the Bar on the ground that he lacked:

> "the character necessary to discipline himself to control his standard of living and the amount of his indebtedness, thus showing a lack of financial responsibility necessary for an attorney."

He appealed and the Court of Appeals affirms, stating:

> **"The primary purpose of the Bankruptcy Act is to give debtors " a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" (Perez v. Campbell, 402 U.S. 637, 648. . .). This purpose may be defeated if certain benefits are denied because the debtor has filed a bankruptcy or because the debtor refuses to reaffirm and reinstate obligations which have been discharged by bankruptcy. . . .**
>
> . . . The legislative history makes clear, however, that Congress' concern was discrimination against debtors based upon the fact of bankruptcy; **the statute was not intended to shield debtors from reasonable inquiries about their ability to manage financial matters when the ability to do so is related to their fitness for the license sought . . . .**
> . . .
> Although the Appellate Division **did not state the reasons for its action** or adopt those of the Committee, . . . its order should be affirmed." [306]

The Court's irrational bankruptcy argument is legal sophistry at its zenith. The following two phrases above labeled (A) and (B), are irreconcilable:

(A) "The **primary purpose** of the Bankruptcy Act is to give debtors " a new opportunity in life and a clear field for future effort, **unhampered by the pressure . . . pre-existing debt**"

(B) "the statute was not intended to shield debtors from **reasonable inquiries about their ability to manage financial matters. . . .**"

The "primary purpose" is logically unattainable if the individual who files for bankruptcy is still subject to "inquiries," pertaining to the debts discharged by the bankruptcy. The Court's opinion "lacks candor." If unpaid debts relate to character for the license to practice law, then why don't licensed attorneys have to inform the Bar on a periodic basis of their unpaid debts? The rule you are left with from the bankruptcy line of admission cases, is to make sure you delay filing for bankruptcy and keep payments on debts up to date, until you are admitted to the Bar. Then you can stop paying and file for bankruptcy. How can the Courts rationally justify denying admission to an individual with unpaid debts, when they do not discipline licensed attorneys with unpaid debts? The answer is simple. They can not. They can only irrationally profess a justification by using legal sophistry, hypocrisy and predicates of economic protectionism. The Applicant should have been admitted.

167 A.D.2d 658 (1990)

The opinion is less than two pages. The Applicant was a member of the Philippines Bar and formerly a Judge in that country. He was denied admission to the New York Bar on character grounds, predicated on his failure to disclose judicial conduct complaints that had been filed against him. In accordance with the objective standard I have consistently promoted, the Applicant should be required to disclose disciplinary or judicial complaints. However, the resolution of the complaint by the other state or country should not be binding on the Bar being applied to. Nondisclosure of such complaints is material if disclosure would affect the ultimate decision on the application.

Applying such a materiality standard is not difficult since the existence of criminal convictions or ethical complaints can easily be verified through the use of national databases. The materiality standard I support, regarding the duty to disclose is predicated on whether nondisclosure would have affected the ultimate decision of the Committee.

Such an objective standard does not create an incentive for nondisclosure. Rather instead the opposite is true. When inquiries are made only in regards to those matters such as convictions and ethical complaints which are easily verifiable, the Applicant would be a complete fool to attempt nondisclosure. It is when the Bar inquires into matters not easily verifiable, such as civil suits and debts, etc. that the subjective materiality standard currently utilized, results in the Bars looking hypocritically foolish. [307]

577 N.E.2d 51 (1991)

REMEMBER THAT BAR EXAM I TOOK 27 YEARS AGO?

The Applicant passed the New York Bar exam 27 years before applying for admission. He graduated from Harvard Law School in 1959 and was admitted to the Massachusetts Bar. He then graduated from the Harvard Graduate School of Business Administration in 1961. He was certified as having passed the New York exam in 1962, but made no effort to complete the admissions process. At no time did he practice law in any state.

In 1989, during an interview he was told that because of his delay in applying, the subcommittee could not recommend his admission. The Committee then adopted the subcommittee report. It concluded that a delay of 27 years was inordinate. The Applicant instituted a proceeding and his motion was denied without opinion. He then appealed. The Court of Appeals reversed, ruling in his favor.

The Court reversed on a very interesting ground. It determined that the Committee lacked the legal power to address the issue of delay. It correctly reasoned that the issue of delay could not be considered under the existing rules. The Court states:

> "Definition of "general fitness" is at the core of this appeal. . . .
> **. . .**
> . . . the Committee asserts, there is no Court of Appeals rule regarding delay, or "staleness" of legal knowledge, leaving that issue for "general fitness" review.
>
> The Committee's broad definition of general fitness must be rejected.
>
> . . . The qualities of personal moral character and fitness to practice law suggest the need for person-by-person investigation and determination at the local, departmental levels. On the other hand, any requirement that candidates have current legal knowledge would have to be the subject of uniform, State-wide standards. **Unevenness among candidates and departments would be "highly inappropriate, if not legally suspect." . . .**
>
> **In Law Students Research Council v Wadmond (401 U.S. 154, 159), the Committee itself espoused as the correct definition of fitness review: "no more than dishonorable conduct relevant to the legal profession." . . .**
>
> The Committee's concern about the implications of long delay between the Bar examination and admission is surely understandable, as is its concern that reversal here exposes a gap in the rules that may, if left untended, disserve the public interest. **Such concerns, however, point up the need for uniform rules requiring admission within a stated period after certification . . . they do not empower the Committee to overstep its jurisdiction and itself establish those requirements.**
>
> Petitioner's delay in seeking admission should therefore not have been the basis for a finding of unfitness. . . ."

I admire this opinion immensely. The Court owns up to what is an obvious loophole in the rules. Rather than simply allowing the Committee to correct the loophole in a post-hoc manner, it renders the correct decision in the instant case, notwithstanding the obvious embarrassing ramifications

to the Bar. The key operative paragraph which fortifies the respect and integrity of the Court by prohibiting the post-hoc redrafting of court rules is as follows:

> "The Committee's concern about the implications of long delay between the Bar examination and admission is surely understandable, as is its concern that reversal here exposes a gap in the rules that may, if left untended, disserve the public interest. **Such concerns, however, point up the need for uniform rules requiring admission within a stated period after certification . . . they do not empower the Committee to overstep its jurisdiction and itself establish those requirements."** [308]

On a scale of 1 to 10, with ten being the best, I give this opinion a 10. I would further note that I agree with the Court, that a rule should be drafted requiring admission within a stated period of certification, since 27 years does constitute an inordinate delay. But you need a rule in place to require it, just like the Court says.

SUPREME COURT, Appellate Division, First Department, New York, No.M-2027; 2000 NYSlipOp 08850; Versuslaw 2000.NY.0050413 (2000)

CRAZY LADY

The Respondent was admitted to the practice of law in New York in 1997. In 1999, the Disciplinary Committee charged her with failing to disclose a prior employer on her Bar application.

The facts were as follows. In 1994, after passing the Bar exam, (but before being admitted which did not occur until 1997) she became romantically involved with the President of a Company she worked for. Stated plainly, she was getting it on by screwing around with the boss, behind his wife's back. In 1995, they had a bitter break-up and she was unsurprisingly discharged from her job.

In 1997, after being admitted to the Bar, she stupidly left a series of telephone messages on his telephone answering machine. She threatened to inform his wife of their sexual relationship, threatened to tell his wife's employer which was a school district, and threatened that he would end up "dead" like her last boyfriend. She was obviously an irrational, crazy woman. She was subsequently arrested and charged with aggravated harassment, extortion and disorderly conduct. She pled guilty to one count of disorderly conduct.

Unsurprisingly, on her application for admission to the Bar, she did not disclose her employment with the company. In her response to the disciplinary action, she presented mitigating evidence consisting of testimony from her current employer. It appears she was not sleeping with her current boss, based upon my reading of the opinion. Her present employer was a non-profit agency which provides and arranges for amongst other things, assistance to victims of domestic violence. The Referee in the disciplinary action recommended a mere two-month suspension from the practice of law, and the Court simply added one month on, for a total three month suspension. Essentially, it was a very minor form of discipline. A slap on the wrist, so to speak.

I happen to agree with both the Court and the Disciplinary Committee's decision in this case. The whole thing was related to her adulterous relationship with a former boss. It caused her to fly off the handle. As a result of that relationship, she simply conducted herself like an irrational, bitter Nut.

My concern with the Court's opinion in this case is that its' proper and correct decision, is wholly inconsistent with the disparate treatment afforded to other individuals who omit minor, immaterial information from their Bar application. It is clear that in this instance, she reaped an immense benefit by failing to disclose the requested information. She got admitted, and then paid a virtually negligible penalty of a three-month suspension after her deception was discovered. The Court's opinion makes it quite clear that there is an incentive to fail to disclose certain requested information, if one can get away with it all the way up to the point of being admitted. Then later if it's discovered, this opinion confirms that it's really no big deal. A minor suspension is better than a total denial of admission.

I also find it interesting that notwithstanding the apparent "death" threat she made against her former "boyfriend," she was considered a valued worker for an agency that offers assistance to victims of domestic violence. I can only wonder what type of "assistance" she provides.[309]

SUPREME COURT OF NEW YORK, Appellate Division, No. 2000-01391; 2001 NY SlipOp 04279; Versuslaw 2001.NY.0003549 (May 14, 2001)

THE VICIOUS and RUTHLESS COURT

The New York Appellate Court in this case was incredibly mean and vicious. The Respondent was admitted to the New York Bar in 1999. Shortly later, disciplinary proceedings were instituted against him on the alleged ground that he made materially false statements in his application for admission. Specifically, the Bar alleged that he falsely answered "no" to an application question which asked if he had ever given legal advice or held himself out as an attorney. In 1997 he had assisted a person to secure an uncontested divorce and accepted a $ 500 fee for doing so, even though he was not licensed to practice law at the time. The Court revokes his law license based on this one isolated and essentially trivial matter. The opinion states:

> "In determining the appropriate measure of discipline to impose, the respondent asks the court to consider that his actions, while improper, were committed out of ignorance as to what he was permitted to do prior to his admission to the Bar and without venal intent. The respondent also states that he did not intend to deceive the court. . . . The respondent also points out his efforts to improve his life through education and hard work while raising three children, the eldest being enrolled in a seven-year medical school program. . . .
> The respondent's admission to the Bar in this State, which was based upon misrepresentation of information on his application for admission is hereby revoked . . . and his name is stricken from the roll of attorneys and counselors at law, effective immediately." [310]

My opinion is that he should have been reprimanded, perhaps even suspended for a short time, but absolutely not Disbarred. The matter was simply too trivial in nature. UPL prohibitions generally speaking, are on a highly dubious ground of legitimacy to warrant such a harsh sanction. It is also clear that his arguable violation of questionable UPL prohibitions was not engaged in with malicious intent, and no one appears to have been harmed by his act. He simply did not know what he was allowed to do and what he was not allowed to do as a Nonattorney.

Based on facts presented in the Court's opinion, he seems to be a fairly nice guy who was trying to help someone for a small fee. If he was wrong, then so be it, he should be fairly sanctioned. But not ruthless and viciously sanctioned by completely depriving him of earning a living. There are simply too many New York lawyers and Judges who have done things a lot worse than this guy to justify punishing him so severely. The Court's decision was a blatant example of fostering irrational economic protectionism at the expense of this man, and nothing more. The Court intentionally hurt him, for the purpose of enhancing the financial interests of other New York attorneys. They took a person who for the most part probably had faith and confidence in the justice system, and turned him into a permanent political adversary. Additionally, all of his friends, family members and anyone who reads the Court's opinion will have a justifiably diminished assessment of the Court's moral character and its' ability to fairly adjudicate other cases.

To put the matter simply, a mean and vicious opinion like this one, can only result in diminished public faith and confidence in the justice system. The reason is as follows. If the Court and Bar were amenable to unjustifiably hurting this man and his family to further their own economic interests, then their is no reason to believe they do not do similarly to other citizens in cases before them.

NORTH CAROLINA

215 S.E.2d 771 (1975)

WE FIND THIS CONTENTION TO BE UNSOUND, EVEN THOUGH IT'S WHAT THE U.S. SUPREME COURT SAID.

The opinion begins by noting that the Board was established in 1933. The correlation between the expansion of State Bar power in the early 1930s, and the promotion of racial prejudice by the legal profession has previously been addressed. The Applicant in this case alleged as follows:

> **". . . Rules Governing Admission to the Practice of Law in the State of North Carolina do not contain adequate standards for the Board to follow** in determining whether an applicant possesses the qualifications of character and general fitness requisite for an attorney and, therefore**, the provisions are unconstitutional on their face in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. . ."**

He contended that **"good moral character" as a standard does not satisfy constitutional requirements.** The Court concludes as follows:

> "We find this contention unsound."

He correctly relied on *Konigsberg I*. The Court first quotes the following passage from *Konigsberg* which in my view confirms that his "contention" was quite sound, rather than unsound:

> "The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal view and predilections, **can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. "**

Notwithstanding the Court's quotation of the foregoing historic passage, it adopts the following interpretation of *Konigsberg*:

> "Even so, those decisions of the United States Supreme Court do not support the suggestion that "good moral character" is an unconstitutional standard. To the contrary, the quoted language from those cases seems to say that the term "good moral character," although broad, has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard." [311]

253 S.E.2d 912 (1979)

SUSPICIOUS MINDS

The Applicant was born in 1935. He was an honor graduate of the U.S. Military Academy in 1959. From 1968 to 1973, he worked as a commodity futures broker, an insurance agent and a real estate broker. He had no criminal record, but did have some minor traffic violations. No fact on his application was controverted by the Board. The Board denied admission based on two incidents. The first incident involved an individual entering a bank and attempting to withdraw $ 50.00 representing himself as the account signator. The individual was not the signator. The Applicant had a post office box, next to a post office box maintained by the signator. The bank's manager identified the impostor as the Applicant, but later admitted she could be mistaken. She also could not say whether his voice was the same as the individual attempting to withdraw the funds.

The second incident involved possible fraud in the use of a mail order form. A postal inspector testified that he received a complaint from a person whose name was forged on a mail order form for a radio. The radio was sent to the Applicant's post office box. The Applicant denied involvement in both incidents.

It appears no arrests were ever made and no charges filed. The Board did not find that he was involved in either incident. In fact, it made no findings at all. It just stated a conclusion that the Applicant had not satisfied them that he was of good moral character. The Board then had the audacity to argue before the Court that it was not required to make findings of fact, but needed to only make the ultimate determination. The Court rules in favor of the Applicant stating:

> ""Facts relevant to the proof of . . . good moral character are largely within the knowledge of the applicant and are more accessible to him than to an investigative board. Accordingly, the burden of proving his good moral character traditionally has been placed upon the applicant . . . .
>
> This rationale does not apply, however, when an investigation is narrowed to one or two incidents of alleged misconduct of the applicant. . . . Indeed, taking into account the superior investigatory resources of the Board, it is reasonable to assume the contrary. **An application for admission to the bar may not be denied on the basis of suspicions or accusations alone.** . . . Yet, if there is not some reallocation of the burden of proof in these circumstances precisely this may happen. . . . **If the Board is not required to prove that which applicant denies the result might be that the application is refused on the basis of a mere accusation.**
>
> It could be argued that such an extreme situation might be avoided by simply requiring the Board to come forward with some substantial evidence to support its charges. We think such an approach should be rejected for two reasons. First, it is not in accord with sound administrative procedure to allow something to be found as a fact when it is not supported at least by the greater weight of the evidence. . . .
>
> Second, such a procedure would be in conflict with our usual civil practice on assignment of burden of proof. As a general rule in this jurisdiction, the party who substantively asserts the affirmative of an issue bears the burden of proof on it. . . . When the Board attempts to rebut his proof by showing some particular adverse fact, it should bear the burden of proving that fact. . . .
>
> . . . If there are material factual disputes, the Board must resolve them by making findings of fact.
>
> **. . .**

> While the matters presented before the Board aroused suspicions that <Applicant>. . . had been engaged in wrongdoing, we have, in the end, nothing more than that. Arrayed against these suspicions is <Applicant's> . . . impressive record. . . .
> In these circumstances, we are reminded of the words of Mr. Justice Black in Konigsberg . . . "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action." So it is here." [312]

My comments on this case are brief. The opinion is good. The Board rendered its' irrational decision relying on mere suspicion and unsupported allegations. In doing so, they demonstrated that the admissions process as stated in Konigsberg is a:

"dangerous instrument for arbitrary and discriminatory denial of the right to practice law. "

260 S.E.2d 445 (1979)

STATE BAR COUNCIL ABOVE GOD IN NORTH CAROLINA

The Petitioner was seeking restoration of his law license. The applicable statute provided:

> "whenever any attorney has been deprived of his license, the council, in its **discretion,** may restore said license upon . . . satisfactory evidence of proper reformation. . . ."

He contended the statute was an unconstitutional delegation of legislative power because it gave the Bar Council unbridled discretion. The Court disagreed stating:

> "The Legislature, in its **infinite wisdom**, has endowed the North Carolina State Bar Council with the duty of ascertaining when a wayward attorney has presented such satisfactory evidence of reformation . . . .
>
> The standard set forth in the statute is the production of satisfactory evidence proper reformation. **. . .**
> An attorney at law is a sworn officer of the court, whose chief concern, as such, is to aid in the administration of justice. In addition, he has an unparalleled opportunity **to fix the code of ethics** and to determine the moral tone of the business life of his community. Other agencies, of course, contribute their part, but in its final analysis, trade is conducted on sound legal advice. . . .
>
> **"No profession," . . . "not even that of the doctor or preacher, is as intimate in its relationship with people as that of the law.** To the doctor the patient discloses his physical ailments and symptoms, **to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties,** his family relationships and quarrels and the skeletons in his closet. . ."

One can not help but to grasp the pompous nature of the Court's irrational attitude and its inappropriate, even ludicrous demeanor. The Court's ridiculous position is that an attorney is more important to the business community than any other person. The Court obviously wants attorneys to have unchallenged power in business to foster the profession's economic interests. It is under the misguided impression that attorneys are more "intimate" with people than doctors and preachers. Its' reasoning is that doctors merely deal with physical ailments. **The comments are sheer lunacy. The Court appears to elevate the legal profession above God.** Setting aside constitutional problems associated with the improper interjection of religion into the opinion, the Court exhibits its' pompous judicial nature at the apex, by stating:

> ". . . only those things that commend him in the eye of heaven, or those sins of his own . . . but to his lawyer he unburdens his whole life . . ." [313]

I am curious as to how the Court knows what people communicate to their preachers and God. Is the Court eavesdropping on the prayers of citizens? On a more practical note, the irrefutable fact is that both preachers and doctors are <u>more</u> "intimate" with their clients, and from a business perspective Certified Public Accountants are immensely closer with their clients than lawyers. Typically, when an

Accountant has a business client, they perform work on a regular monthly or quarterly basis. The client consults with the CPA about all financial aspects of their life and the continuing relationship that is formed often results in the client consulting the CPA about personal matters as well. In sharp contrast, a lawyer is typically involved with a client to satisfy one immediate particular need. The lawyer is merely engaged to represent the client in one particular matter, be it criminal or civil in nature. Once that matter is concluded, the relationship between the lawyer and client typically terminates. It is for this reason, that lawyers are more interested in establishing ongoing relationships with CPAs, as opposed to the reverse. People on an ongoing, continuous basis are much closer with their CPAs, Preachers and Doctors. Lawyers are a distant fourth at best. It is also noteworthy to point out that out of all the professions, lawyers are the worst regarded amongst members of the general public.

Turning to the legal issues, rather than the Court's false, self-serving adulation of the legal profession, their position is that the determinative standard in the statute is "satisfactory evidence of such reformation." It then falsely concludes that the council does not have unbridled discretion. Since however, the statute itself includes the word "discretion," the Court's weak logic is strained. Regarding what constitutes "satisfactory evidence," no guidance is provided. It is a vague standard, that does not limit the degree of discretion to be applied. The litigant was right. The statute provided "unbridled discretion."

The Court was wrong. It lacked candor and was misleading. It attempted to justify its' own lack of good moral character with the manipulative use of logic, accompanied by false and unwarranted self-praise, attempting to deceive anyone reading its' irrational opinion.

302 S.E.2d 215 (1981)

THE PEEPING TOM

The Board denied the Applicant permission to take the February, 1981 bar exam, after he took it. Yes, you read that right. He took the exam, and then they denied him permission to take it on character grounds. While their stance in form suffers from an obvious logical infirmity, in substance they accomplished their goal by refusing to inform him of the exam results.

The character issue focused on one incident. In 1975, while a student at the University of North Carolina at Chapel Hill, he shared an apartment. One evening when his roommates were gone, he entered the attic's apartment with a camera. Using an electric drill and a keyhole saw, he drilled holes through the ceiling of another apartment occupied by female students. He was able to see into the bathrooms and bedroom of three women. The women called the police and he was arrested. He was charged with illegal entry and secretly peeping into a room. He was tried, convicted and fined $ 50.00.

In a subsequent lawsuit brought against him by two of the women, he prevailed. The Applicant's version of the story during the Bar Hearing was that he used the attic for studying and took the camera into the attic to clean it. He said there was no intent to peep on the women. The Board found his testimony was untrue, and that his statements were made with an intent to deceive. It similarly found his answers to interrogatories in the lawsuit in which he prevailed were untrue.

The Court denied admission. I would admit him. The case raises interesting issues. First, based on the facts set forth in the opinion, I do not believe the Applicant's explanation. I am convinced he was peeping on the women. In any event, his conviction is dispositive of the issue.

Although he was convicted and I believe he did commit the offense, his continued assertions of innocence do not constitute lying. As I stated previously, an Applicant should be able to assert innocence even in the face of a conviction. Such an assertion however, should be given minimal weight in the absence of substantial and extraordinary corroborating evidence. The nature of the offense requires consideration of the circumstances to determine if it was heinous, serious, between serious and trivial, or just trivial. I would determine the offense to be between serious and trivial. This determination is based in large part on the Applicant's age at the time of the offense.

While the Court's opinion does not state his date of birth, since he was an undergraduate, I am assuming he was between 18 and 23. The nature of the offense considering his age and the college setting, leads me to believe it was an unwise college prank more than anything else. This conclusion is bolstered by the fact that he was only fined $ 50.00, rather than given any type of probation or prison term. It is important to note that if my assumption about his age is incorrect and he was for instance in his late 30s or 40s, I would reconsider my decision.

Applying the above premises, the Court's opinion was rendered in 1983. he was convicted of the incident approximately eight years earlier. Assuming, he engaged in no other criminal activity, there has been a sufficient time lapse, and considering the nature of the offense, I would admit him. [314]

386 S.E. 2d 174 (1989)

DON'T ASK THE APPLICANT, IF YOU'RE NOT ASKING THE LICENSED ATTORNEY and JUDGE

A MATERIALITY STANDARD PREDICATED ON WHAT BEST FOSTERS THE ECONOMIC INTERESTS OF THE STATE BAR

The next two cases involve the same Applicant. Based on facts set forth in the Court's opinions, he was never arrested or convicted of any crime. He was denied admission on character grounds. Question 17(c) required an Applicant to:

> "list all debts over $ 200, including student loans, and indicate status"

Question 17(d) inquired whether anyone had ever asserted a claim or demand against the Applicant which was not made the subject of any action or legal proceeding. Question 18 asked about involvement in civil suits. The Applicant filed an amended application listing several debts and civil suits not included on his original application. Question 37(b) required an Applicant to give:

> "the name and address of each organization whose membership consists primarily of attorneys and of which you are or have ever been a member"

His original application indicated no such membership. His amended application listed two organizations. Question 6 required an Applicant to list:

> "every permanent and temporary residence you have ever had . . . **since your 16th birthday"**

The question also required an Applicant to give the exact address of each residence. The Applicant failed to include a Louisiana residence during a semester when he lived with his fiancee. He also failed to list a one month employment as a laborer following graduation from college. He admitted that he was careless in filling out the application and explained the omissions as inadvertence. The Board rejected his contentions. The Court denied admission. It concludes that the effect of the omissions was to mislead and deceive. The opinion states:

> "The basis of the Board's finding was the failure to list all addresses, places of employment, debts and actions in which applicant had been a party. The Board placed the greatest weight on the applicant's failure to list his debts and the action to which he had been a party.
>
> A material omission from a Bar application is "one that has the effect of **inhibiting the efforts** of the bar to determine an applicant's fitness to practice law. . . . Like misrepresentation, evasive responses and misleading statements, a purposeful pattern of failing to disclose material matters required to be disclosed can "obstruct full investigation into the moral character of a Bar applicant, inconsistent with the truthfulness and candor of a practicing attorney. . . .
>
> Personal indebtedness required to be disclosed on a Bar application is a material matter requiring full disclosure. . . .
>
> . . .

> . . . If evidence of an applicant's omissions becomes apparent, the Board **should first determine if the applicant made the omissions purposefully.** If the Board determines that the omissions were purposeful, the Board must then decide whether the omissions "so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. . . .
>
> "<A state> has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law. In re Griffiths, 413 U.S. 717 . . . (1973). . . .
> . . .
> **The findings taken singly may not be sufficient to disqualify the applicant from the practice of law in North Carolina. . . . However, when the findings are viewed in the aggregate**, they reveal a systematic pattern of carelessness, neglect, inattention to detail and lack of candor that permeates the applicant's character. . . ."

Zero plus zero is still zero. The concept of accumulating immaterial omissions for the purpose of falsely asserting that together they constitute a material intent to deceive is crap. The nature of the items do not lose their character through an artificial process of accumulation in which the Board taints each piece going through the process. This Applicant carelessly omitted trivial information that the Bar had no constitutional right to obtain in the first place.

The questionnaire imposed an unreasonable burden by requiring disclosure of information dating back to age 16. Applying such a burden to virtually anyone who is at least 40 years old, would result in the omission of information. The application was designed to foster the omission of information. The fault therefore, rests with the Bar.

Can you list the exact dates and addresses of where you have lived since age 16? Can you list all your employments and civil suits? Can you list all of your debts over $ 200? What constitutes asserting a "demand" for payment of such debts? Does simply sending someone an invoice suffice? If you have a business, do you need to send copies of every invoice over $ 200 related to a past due debt?

Many businesses and entities as a standard policy don't even attempt to pay debts until they are 90 days past due. The U.S. Government is a prime example. Ask the Health Care Financing Administration (HCFA) when they pay medicare bills. Typically, it takes about five months on the average. Most governmental agencies would obviously have difficulty satisfying State Bar character standards. The irrefutable fact is that **government agencies and many large corporations rarely pay debts in a timely manner.**

What about licensed North Carolina attorneys? If a person was admitted to the North Carolina Bar at age 25 and is now a 65 year old pompous member of the Court, when's the last time they provided a list of civil suits, debts and employment? Would they even be able to? I'm betting that most North Carolina attorneys would not even be able to provide the information that is required of an Applicant. Ah, but they don't have to, do they? It is a clear violation of the Equal Protection Clause. A convincing Dissent writes:

> "I believe the Board erred in its findings of fact and conclusions. **It appears to me that if the appellant had included all the matters on his application which he omitted it would not have prevented him from taking the bar examination.** The appellant must have known this and the only plausible reason for his failing to do so was inadvertence. He may not have understood the importance of furnishing . . . but this does not mean he consciously attempted to mislead the Board. I believe the testimony of the appellant was credible and there was no contrary evidence. The Board should have accepted it." [315]

That is the test to be used. Whether the omitted information would have affected the application's outcome. It's a legal concept known as "reversible error." The Judiciary is quite amenable to applying it when litigants receive "ineffective assistance of counsel" from attorneys who purportedly possess good moral character.

In reviewing an ineffective assistance of counsel claim, the element of materiality is assessed in the following manner. If the error committed by counsel is not so serious that the case would have come out differently, it is ignored. Only when the error caused the wrong result, does the ineffective assistance of counsel claim result in "reversible error." Numerous other examples exist where the Judiciary applies materiality in a manner that it refuses to do with respect to Bar applications. Some other good examples are the subjects of Judicial Disqualification and attorney malpractice. They just don't seem to want to use the "accumulation of errors," or "inhibiting the efforts," standard of materiality in those areas. Only for Bar admission cases.

447 S.E.2d 353 (1994)

MACHIAVELLI's EX PARTE COMMUNICATION IS ALIVE AND WELL

This case involves the same Applicant as the preceding case. The Court's second opinion is rendered approximately five years after the first. In the first opinion, the Applicant was denied admission due to the omission of immaterial items such as residence addresses, debts and employment history. The Court again denies admission.

The Applicant argues that the Board intentionally misled him to believe that it would only focus on the current status of his moral character (rather than reasons for the prior denial). He relied on their misrepresentation. In support, he presented a letter, dated April 24, 1991 in which **the Board stated expressly that its inquiry would:**

"necessarily focus on the current status of <his> character and fitness"

The operative term is "current." It would seem that he pretty much had the Board on a slam dunk. They weren't candid, frank or truthful with him. They sent a letter expressly stating they would focus on the current status of his character. They then did otherwise. The Court now is amenable to running interference on behalf of the Board by pointing out that the same letter also stated:

> ". . .Rules requires that an applicant be of good moral character both at the time of . . . the written bar examination and at the time a license to practice law is issued"

The Court's position is that since the Applicant was allowed to take the February, 1987 exam, he was given sufficient notice that anything related to his character would be considered. At best, the Board was misleading. They didn't provide a fully open and frank disclosure of what they were seeking to do. They "omitted" to resolve the apparent "contradiction" in the two cited phrases above. It appears to "deceive" the Applicant.

Two different standards of "materiality" exist here. One for the Applicant and one for the Board. The Bar's letter undeniably "inhibited the efforts" of the Applicant to prepare for the inquiry. Approximately five months after the letter, the Board sent a notice indicating it would look into matters beyond his current moral character status. This was an apparent attempt to cure the due process deficiencies of their prior misleading letter. The Court sees it differently and concludes:

> "Based on the foregoing, we conclude that the Board properly considered the 1986 application in making its findings and conclusions **and did not mislead applicant to believe that the 1986 application would not be considered.**

Ah, if only this Applicant had been the beneficiary of such a lenient standard when the term "misleading" was applied to his errors. Then he would have been admitted the first time. The Board and Court then wouldn't look so hypocritical. Here's a beauty of a quote from the Court's opinion:

> "In his final assignment of error, applicant argues that the Board erred by violating . . . the Rules which requires that applicants be notified of protests to their application. Applicant contends that <name>. . . **protested his 1987 application through ex parte communications with the Board**, and his 1991 application through testimony at the 16 October 1991 hearing. **These communications and testimony do not constitute a protest as defined by the rules.**

> We note that the Board is free "to make or cause to be made such examinations and investigations as may be deemed necessary," and therefore, **it was not improper for the Board to question . . . without first notifying applicant."**

Here you have a situation where the application was being secretly sabotaged by someone through the use of ex parte communications with the Board. That however, doesn't constitute a "protest" according to the Court. Applying the Bar's own materiality standard, the ex parte communication "inhibited the efforts" of the Applicant to respond to the derogatory information. How could he? The information was communicated secretly right from the beginning. The Court's opinion concludes:

> "Citing Willner v. Committee on Character and Fitness, 373 U.S. 96 . . . (1963), applicant contends that he must be afforded an opportunity to be confronted with, and cross-examine, witnesses who are adverse to him. However, Willner dealt with the denial of an applicant's admission to the Bar without the applicant having an opportunity to be heard prior to the adverse decision. . . . Justice Goldberg, in his concurrence, with Justices Brennan and Stewart join, stated: "As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required . . ." [316]

As I understand the concurrence, it nowhere provides a green light to write a letter to an Applicant saying one thing, and then doing something else!! It's also not a green light for inappropriate ex parte communications.

472 S.E. 878 (1996)

SINCE THE BOARD WAS INCORRECT WHEN IT SAID THE APPLICANT LIED, THE BOARD MUST BE LYING

The Applicant was admitted to the New York Bar in 1978. On his North Carolina Bar application he did not disclose that he sat for the New Mexico Bar exam in 1973. The Board also concluded that he did not properly disclose his registrations to take the California Bar exam. Specifically, he stated that he registered:

> "at least fifteen or sixteen times" and took the examination "ten or twelve times more or less"

In fact, he had registered twenty-four times and failed the exam eighteen times. Registering 24 times, is incorporated in the phrase "at least fifteen or sixteen times" by use of the operative terms **"at least."** Taking the exam 18 times is incorporated in the phrase "ten or twelve times more or less" by use of the terms, **"more or less."** This Applicant simply didn't know the precise numbers since they spanned over many years. He provided sufficient disclosure on the California exam issue. He probably didn't even remember sitting for the New Mexico exam, since he sat for it two decades earlier. I therefore conclude that the Board's contention is meritless.

The Applicant also disclosed that he maintained a residence from June, 1978 to the present at a New York address. The Board determined he was the defendant in an action where using his office cellar as a residence was alleged to be in violation of a zoning code. In that action, he filed an Answer denying that he used it as a residence. The Board concluded that his Answer in the lawsuit, was inconsistent with his Bar application. He amended his application on this minor issue.

Finally, the Board determined he did not provide copies of all relevant documents pertaining to a lawsuit. There is no indication that he failed to disclose the existence of the lawsuit. The Board denies admission on character grounds. The Applicant argued that he was given inadequate notice about the nature of the questions to be asked. Essentially, he was arguing that the Board was not candid. He asserted the notice of hearing failed to inform him of the possibility that he would be accused of being misleading. The notice also apparently did not advise him of the statements that the Board was alleging were untruthful. The Board did not provide him with complete information. Rather instead, it stated in a misleading manner that the Applicant should:

> "be advised that inquiry can also be made about the answers to any questions set out in the application"

How very "evasive" of the Board. It "omits" the most "material" information in an attempt to "mislead" the Applicant. It doesn't fully inform him of the questions to be asked. The Board "inhibits the efforts" of the Applicant to prepare. The Board characterized his disclosure of the number of times he sat for the California Bar exam as an "untruthful statement." In his answer to question 30 concerning Bar examination history, he stated:

> "So how many times have I signed for the New York exam? Three to the best of my memory. As to dates I have no idea. The same is true for the California exam . . .
>
> If information relating to this is critical to the North Carolina examiners, I invite you to make inquiry."

He was honest. He said that he didn't know the exact number, but indicated it was a lot. Since he was truthful, the Board was therefore lying, by saying that he was "untruthful." The Court states as follows in reference to how omissions should be considered:

> "If the Board determines that the omissions were purposeful, it must then decide whether the omissions "so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character."

So, why was the Board so irrational in this case? The answer is disclosed in the portion of the Court's opinion which reads as follows:

> "**Applicant's cavalier attitude** toward gathering the information it was his duty to supply to the Board constitutes additional evidence from which the Board could conclude that his misstatements and omissions were purposeful. . . .
>
> Applicant next assigns as error the Board's determination that he willfully failed to provide to the Board material documents concerning **a class action lawsuit applicant brought against the New York State Grievance Committee** and its members. . . . applicant submitted to the Board only the complaint in that action; he did not provide copies of the defendants' motion to dismiss for improper venue, or the stipulation between applicant and the New York Office of the Attorney General that certain parties be dropped from the lawsuit . . . ." [317]

The Applicant had sued the New York Grievance Committee. The North Carolina Board and Court didn't like his attitude. They had nothing material on him, so they falsely inflated the importance of immaterial errors. Who could remember the exact dates of taking a Bar exam 24 times?

This case sets forth a good understanding of the Bar admissions process which essentially works as follows based on my research. Draft an application that is so cumbersome, comprehensive and detailed that it is virtually impossible for the Applicant to complete each item absolutely correctly. Then, if there is any aspect of the Applicant's attitude the Board doesn't like (such as filing lawsuits against the Bar), just pick out a few of the innocent, immaterial errors or omissions and falsely label them as "lies." The Bar applies their scheme as follows. Don't deny admission based on a lawsuit filed, because that would make the Bar appear protectionist. Instead, deny admission based on the purported "lies" no matter how immaterial. To the extent the Bar engages in the same types of omissions and errors itself, they don't have to worry. In such instances, the State Supreme Court will run interference for the Bar.

The concept is that the ends justify the means. The Bar's protectionist interest is fostered without the Bar appearing to be protectionist, and the Applicant with an "attitude" is denied admission. The fact is that State Bar Boards are on extremely tenuous ground on the omissions issue. It's one thing if someone affirmatively states a fact, that is not true. It's quite another if someone doesn't present information in the manner, form or with the completeness the Bar subjectively desires. The Boards are more evasive, misleading, and less candid than virtually all Applicants.

NORTH DAKOTA

257 N.W.2d 420 (1977)

"MATERIALITY" DECEPTION by the COURT

I present this case for its discussion of the materiality issue on nondisclosures. The Court states:

> "Where a false statement or failed disclosure in an application for admission to the bar has the **effect of inhibiting the efforts of the bar** to determine an applicant's fitness to practice law, it is material. We do not second-guess the effect of the true and complete application on the decision of the State Bar Board."

This is in many respects the heart of the dispute on materiality. **The question boils down to whether it should be judged in the context of "inhibiting the efforts" or based upon the "effect of the true and complete application."** I adopt the premise that the latter is the correct standard, while North Dakota irrationally concludes the former is the proper standard. The North Dakota Supreme Court and other Courts that follow such a standard are wrong. I am right.

Let us explore the impact of adopting the incorrect standard used by the North Dakota Supreme Court. The primary rationale of the "inhibiting the efforts" standard is that when an Applicant fails to disclose a requested fact, the Bar's ability to assess character is inhibited. **I assert the result of such a rationale is that the concept of materiality is negated in its entirety. The reason is that "failing to disclose any requested fact" in and of itself then constitutes "inhibiting the efforts."** The State Bars have essentially played a deceptive trick of legal logic. They have manipulatively formed the perfect circular argument. Their TRICK functions in substance as follows:

> "A nondisclosure is "material," if it inhibits the effort of the bar to assess an applicant's character. Inhibiting the efforts to determine an applicant's character includes failing to disclose a requested fact. Consequently, the failure to disclose any requested fact is a material nondisclosure. All nondisclosures are thus material."

By defining materiality as "inhibiting the efforts," the State Bars have completely eliminated the element of materiality. Of equal importance, they have done so while still continuing to falsely profess it is an essential element. They are misleading. They are lacking candor. The North Dakota Supreme Court is a prime example. If materiality is an element of nondisclosure, then the nature of the omitted information must have some relevance. That relevance is properly balanced when viewed in the context of the "material effect" of the nondisclosure. The "material effect" is predicated on how an affirmative disclosure would have affected the ultimate decision on admission. An example is warranted to demonstrate the impropriety of the irrational North Dakota standard compared to the correct standard.

Let us assume hypothetically that some Bar somewhere begins to include the following question on its application:

> "Have you ever been accused of dishonesty by a romantic companion?"

In view of the fact that applications in the past have included questions pertaining to allegations of dishonesty in a divorce proceeding, the above possibility, particularly in today's McCarthylike State Bar environment is not all that far fetched. Let us assume in our hypothetical that one evening, you and your romantic companion are having some major league, passionate sex that goes something like this:

Oh BABY!! Oh BABY!!! YEAH!!! YEAH!!! OH YES!!! OH YES!!! OOOOOOOOOH!!

We will presume that both parties cum. You and your companion now begin to engage in some post-sex intimate conversation, during which you are asked the following question:

"Am I the best you've ever had?"

Now, sadly while your current romantic companion is your true love interest, the simple fact is that when it comes to sex, he or she is actually not the best you've ever had. Nevertheless, to avoid hurting the feelings of your romantic companion, you answer quite hesitantly:

"Uh, Yes, you are the best I've ever had."

Your companion sensing the hesitation in your voice responds:

"I don't think you're telling me the truth."

Well, the next morning you're completing the State Bar application and there's the question.

"Have you ever been accused of dishonesty by a romantic companion?"

You don't want to lie, so you leave it blank. Bam! Applying the North Dakota standard of materiality, you have failed to disclose a material item. Your admission is subject to denial. Perhaps, however some feel the hypothetical is unrealistic. For those who believe so, consider the impact of the North Dakota materiality standard on the following question which has been included on many Bar applications in one form or another:

> "Describe any other derogatory incidents in your life not otherwise disclosed within this application."

Applying the irrational North Dakota standard, the Applicant's failure to disclose an incident which is subjectively construed by the Admissions Committee to be derogatory, constitutes a material nondisclosure. The North Dakota materiality standard of "inhibiting the efforts" is logically unworkable, hypocritical, vague, ambiguous, overbroad, negates materiality, legal sophistry, and just plain dumb. The opinion in this case also includes the following statement:

> "Conduct which might be considered acceptable for other persons may not be so for a lawyer." [318]

What about the reverse though? By failing to make inquiries of the licensed attorney similar to those of the Bar Applicant, doesn't the following become the case:

> "Conduct which is acceptable for lawyers, may not be so for Nonattorneys seeking to become lawyers."

Such as paying debts, declaring bankruptcy, filing civil suits, and of course, being a comedian.

342 N.W.2d 393 (1983)

OH, SO NOW THE BAR WANTS TO BE CUT A LITTLE BIT OF SLACK!
WHY DON'T WE APPLY THAT LIL 'OL "INHIBITING THE EFFORTS"
STANDARD TO THE BAR ?

During the administration of the MBE exam irregularities occurred that were not the fault of any Applicants. They were due to the Bar Board not adequately ensuring Applicants had appropriate testing facilities. Specifically, while the test was being administered, noise disturbances were prevalent in the room caused by a sales meeting conducted in an adjacent room. The noises included voices, music, and clapping. The lighting in the testing room was also poor. For these reasons, the Board provided an additional 27 minutes of time for examinees. Subsequently, the Board also readjusted its grading procedure on the essay exam.

The Applicant in this case petitioned for a re-grading of the MBE exam based on the noise disturbances. He wins and is ordered to be admitted. I would not re-grade the exam and therefore would not admit the Applicant. I present this case to address some points in the Dissenting opinion which reads in part as follows:

> **"**This brings us to the focal point: **either we abide by the minimum standards we have set up or we disregard them for everyone and suffer the consequences. Credibility is a partner of justice. Disregarding the minimum standards previously approved will not enhance the credibility of the bar, the bar board, or the judiciary.**
> **. . .**
> In every contest or qualifying procedure the rules are announced ahead of time and they are strictly followed, and if some interfering event occurs which may have a direct bearing on the outcome or result, a replay is permitted or conducted or the project is declared no contest. In the instant situation, <Applicant's> contention can be likened to changing the rules after the contest . . . which is frowned upon in every section of our society.
> **. . .**
> **In addition, to make the System work the principal (the Court) may not pull the rug from under the agent (the Board) in a situation as we have here."**

I passionately agree with the two paragraphs cited above. The rules were set. They can't be changed. The Bar Board screwed up when they scheduled the exam. They didn't do their job diligently or competently. They lacked the requisite professionalism by failing to check what was scheduled next door to the exam room. They wanted to escape looking like imbeciles, and so they changed the rules "post hoc" to make it easier for the Applicants, in order to protect State Bar egos. That illegitimated the process.

The Bar's foul-up, fails scrutiny under the North Dakota "materiality" standard. Their incompetence resulted in "inhibiting the efforts" of the Applicants to take the exam and receive a grade representative of their preparation. Their "failure to disclose" the rule changes before the exam, was a material nondisclosure reflecting adversely on the Bar Board's character. The Dissent also makes a statement that I passionately disagree with, which is:

> **"I do not believe we should determine qualifications on the basis of the brief submitted by the applicant because the applicant may have received considerable help in writing the brief.** Neither do I believe that we should take into account the oral argument made by the applicant. A person may be very glib in making speeches or, for that matter, may be a great

orator, but that does not make that person a lawyer. **Facetiously,** maybe the court should interview each applicant and also admit senior law students who submit briefs and make oral arguments on cases before the exam is given."

The Court has a responsibility to consider the Applicant's brief, unless it was submitted in violation of a court rule. Since the Court gave the Applicant opportunity to present oral argument, it is bound to consider the contents. Based on the portion of the above paragraph that makes reference to "a great orator," it seems the Applicant did an exceptional job. The part about the above paragraph, that is particularly interesting reads:

> **"Facetiously,** maybe the court should interview each applicant and also admit senior law students who submit briefs and make oral arguments on cases before the exam is given." [319]

I don't fault the Dissent for using the word "Facetiously," but it is irrefutable that the Dissent's use of the term cuts directly into the heart of those State Bar admission opinions which chastise Applicants for being facetious, flippant, snide, sarcastic, having a bad attitude or demeanor.

399 N.W.2d 864 (1987)

IT'S NOT ENOUGH TO BE ADMITTED

This is a particularly unusual case. The Applicant failed the July, 1985 Bar exam and the February, 1986 exam. She then petitioned for re-grading of the February, 1986 exam. While the matter was pending, she passed the July, 1986 exam. She was admitted to the Bar in September, 1986.

Notwithstanding her admission, she pursued the petition for re-grading of the February, 1986 exam. The Bar Board argued that her petition was moot because she had been admitted. She responded that the appeal was not moot because she had been offered employment with the Judge Advocate General Corps of the United States Army, but only if she had not twice failed the Bar exam. She maintained that only an admission predicated on the February, 1986 exam, rather than the July, 1986 exam would permit her to obtain the employment. The Court considers the merits of her arguments with respect to the February, 1986 exam and ultimately rules against her.

I present the case simply because of it's unusual fact set. It's the only case I've come across where the Bar Applicant loses, even though they were admitted to the Bar. I admire the Applicant for pursuing the claim. [320]

458 N.W.2d 501 (1990)

GIVE US THE FACTS, NOT JUST THE CONCLUSION

The Applicant graduated from law school in 1988 and applied to the North Dakota Bar. He had been charged with Theft of Property and acquitted at trial. He disclosed it on his application. The Board's investigation also disclosed civil judgments, as well as an outstanding arrest warrant in California. He did not disclose the following charges:

1969	Illegal possession and open container
1976	Aggravated promotion of prostitution
1976	Gambling
1982	Forgery
1982	NSF check
1982	NSF check
1982	Forgery
1983	Theft of Property
1988	No account check
25 Separate motor vehicle violations	

The Applicant asserted that the lack of rules, guidelines and statutes involved in this type of proceeding rendered him helpless in the preparation of his case. In addition, he contended that the Board failed to give proper notice of the specific grounds upon which its negative recommendation was made. The notice given was as follows:

"inappropriate behavior in the following respects:

1. Unlawful conduct;
2. It appears you may have made false statements and did not fully disclose information requested in the admission application;
3. Fraud and misrepresentation
4. Neglect of financial responsibilities
5. Compulsive gambling (emotional instability)

The Applicant contended that the above allegations were too vague to enable him to prepare an adequate defense. He claimed the problem was compounded since no discovery was provided under the Board's rules. The Court denies admission. I cannot make a determination whether he should have been admitted, since the opinion does not contain the most relevant information. There appear to be nine charges that were not disclosed.

I find it quite disturbing and significantly "misleading and lacking in candor" that the Court's opinion "fails to disclose" the most "material" information pertaining to seven of the charges. The most "material" information is the ultimate disposition of the charges. Were they dismissed? Did the Applicant plead guilty? Was he convicted? The opinion does not say. It leaves the reader with the impression the Court is covering up information that may be exculpatory to the Applicant.

I have to assume that if the Applicant had been convicted, the Court would have said so. If he was not convicted, then why does the Court "fail to disclose" such a material fact? The only conviction disclosed was over 14 years old. That's a long lapse of time and in the absence of other disqualifying conduct is not sufficient to deny admission. Regarding the notice given, concerns once again confront

me. Notwithstanding, what appears upon first glance to be an Applicant who should be denied admission, he was absolutely entitled to better notice. The five "grounds" stated were:

1. Unlawful conduct;
2. It appears you may have made false statements and did not fully disclose information requested in the admission application;
3. Fraud and misrepresentation
4. Neglect of financial responsibilities
5. Compulsive gambling (emotional instability)

With the possible exception of #5 above, the purported "grounds" are nothing more than vague restatements of the ultimate conclusion reached. No factual information supporting them is provided. What conduct did he engage in that the Bar contends was unlawful? What false statements did he make? What acts did he commit that constituted fraud? What did he do that constituted a neglect of financial responsibilities?

The Applicant was constitutionally entitled to be informed with greater specificity of what he would be questioned on. The notice gives the appearance of being "evasive." It looks like the Bar wants to say as little as possible, rather than being completely frank and candid. In this manner, they can surprise him with the specific facts when he's at the Hearing. Admittedly, the application looks bad at first glance. It is by no means a slam dunk denial however. The ultimate resolution of the charges needs to be disclosed. The Bar and Court are far from innocent in this case. Quite to the contrary, they appear to be guilty of precisely what they accuse the Applicant. Engaging in conduct that personifies negative character qualities of failing to disclose, being misleading, evasive, lacking in candor, lacking respect for fairness and justice. [321]

OHIO

1992.OH.18 (1992) VERSUSLAW

DO LICENSED OHIO ATTORNEYS PAY THEIR DEBTS?

This opinion is approximately one page in length. It is a good example of the imbalance that allows licensed attorneys to benefit from application of a lower standard of conduct than Applicants, with respect to debts. The Applicant was a licensed Michigan attorney. She filed annual income tax returns, but did not pay all of the tax. She owed the IRS approximately $ 98,000 and Michigan approximately $ 14,000. In addition, she had not satisfied a civil consent monetary judgment related to a hospital bill for services rendered in 1983. The Ohio Supreme Court denies admission on the ground that she neglected her financial responsibilities.

The impact of the case is as follows. If she had already been a licensed Ohio attorney, she would not be subject to disciplinary action in Ohio for failing to pay her debts. As an Applicant to the Ohio Bar however, she can be denied admission for failing to pay debts. The double standard is obvious. [322]

1994.OH.358 (1994) (versuslaw)

JUST GIVE ME ONE MORE MINUTE!

The Applicant sat for the February, 1993 exam. On the second day, he was purportedly observed marking answers after the time expired. Allegedly, he continued to mark answers even after being told by Supreme Court personnel to stop. When questioned by the Board, he denied completing any answers after the allotted time. He then also denied the accusations in a written statement. On April 16, 1993 the Board issued its report, finding that he had engaged in the conduct alleged. The matter was then heard by a panel on May 5, 1994.

At the Hearing, the Applicant admitted he continued to answer bar examination questions after being told to stop. He testified that his actions were precipitated by extreme stress and a recent family crisis. The Board denies admission and the Court does likewise.

I would not admit the Applicant under the facts presented. I would not admit him however, solely on the ground that his exam results were invalidated. Furthermore, although I would not admit him, I have a general sense upon reading the opinion that the Court is not presenting all material facts. The part of the opinion that generates my concern reads:

> "He continued to mark answers even after being told personally by Supreme Court personnel to stop." [323]

I have a difficult time believing the above quote. Basic logic dictates that if you're going to cheat on an exam, you have to make sure that you don't get caught. If he continued to mark answers even after being told to stop, he has to know that he's going to get caught. Some fact has to be missing. It just doesn't make logical sense. He could not have been that stupid.

I also have a general sense that he was "suckered" a bit by the Board. He denied cheating both verbally and in writing initially. Then after his application was denied, he admitted that he continued to answer questions after being told to stop. I believe there is a possibility (not a certainty) that he may have been "suckered" into this confession after some Ohio attorney made a statement suggesting (this is a hypothetical only, the opinion certainly does not include it):

> Hypothetical Quote : "Look, you want to get in the Bar. What the Board wants to hear is that you did cheat. They then want you to apologize for it. After you do that, they'll be more likely to forgive you for it and you'll probably be admitted. If you stick to your original story however, then you're certain to be denied admission."

There is a possibility that the Applicant's confession may have been the equivalent of a coerced guilty plea that takes place so often in Courts around the nation. This feeling is bolstered by the fact that the opinion's sentence regarding marking answers after being personally told to stop by Supreme Court personnel, just doesn't seem to fit in with other facts in the opinion.

I am forced to concede however, that I am hypothesizing here and could be wrong. In any event, I do agree that once having made the admission, whether "suckered" into doing so or not, admission had to be denied solely because his exam results were invalid.

1994.OH.170 (1994)

AN APPLICANT WHO PLAYED AN IMPRUDENT GAME

This is an attorney disciplinary proceeding. The Applicant was admitted to the Ohio Bar in 1989. On her application she represented that she had not been a party to legal proceedings and had not been treated for mental illness.

In a letter dated June 29, 1991, she informed the Board that in 1987 she was charged with shoplifting a package of cheese. The charge was dismissed and expunged from her record. She explained that she failed to disclose the matter on her application and recently realized her obligation to do so. She also admitted that she did shoplift the cheese.

The board referred her letter to a review subcommittee which notified her in 1991 that it would take no further action. In 1992, she wrote the board again and disclosed two other shoplifting incidents prior to 1987. In one she was charged with summary theft and paid a fine. The other resulted in no charges, when she stole candy bars. The new disclosures prompted the board to investigate. At the Hearing, she emphasized that she had come forward voluntarily to confess her nondisclosures, but admitted that her conscientiousness was motivated in part by her fear that the past incidents might otherwise be discovered. The panel recommended that her license be suspended and the Court agreed.

I agree with both the panel and the Court's decision to the extent predicated on the incident prior to 1987, in which she was charged with summary theft and paid a fine. That's a conviction and should have been disclosed. Nondisclosure of a conviction warrants suspension. I do not believe however, that she had any constitutional obligation to disclose the charge dismissed since it was expunged, or any duty to disclose the incident where no charges were filed.

The Board's handling was totally hypocritical. If nondisclosure is required of offenses not resulting in a conviction, why did they inform her they would not take action regarding the first instance of nondisclosure? Applying their own standard of nondisclosure (which as indicated, I believe to be an incorrect standard), they had an ethical obligation to discipline her. They were willing to let her off the hook for the first instance. That smacks of inconsistency. Conversely, if the Board adopts my standard, their was no need for her to disclose the dismissed and expunged shoplifting incidents.

The Board, Court and myself realize this Applicant played a game with them. She did not disclose matters on her application. She got admitted. Then after being admitted, and recognizing attorneys are held to a lower standard than Bar Applicants, she disclosed the incident that was dismissed and expunged. She got the rubber stamp of approval on that particular incident, in the hope that it would set a precedent for her. Then she disclosed the two other offenses, under the mistaken belief such would receive the same treatment. Her game was transparent, but in disciplining her for playing it, the Board had to do exactly what she knew they would have to do.

They had to be inconsistent, contradict their prior action, and appear hypocritical for treating two similar shoplifting incidents in a dissimilar matter. To discipline her, they had to sacrifice their own credibility. [324]

1994.OH.173 (1994)

The Applicant passed the 1993 Bar exam. He had worked in his father's business between 1983 and 1991. The Ohio Attorney General instituted a civil action against the business for alleged violations of the Ohio Consumer Sales Practices Act. The Applicant was named as a defendant in the civil action, but entered into a consent dismissal with the Attorney General and agreed to testify against his father. The consent dismissal imposed several conditions. In the consent dismissal, the Applicant neither admitted or denied the allegations. Based on this civil suit, the Applicant was denied admission.

I would admit him for several reasons. First, he was never convicted of a crime. If he engaged in criminal activity with respect to the business and the State can prove it, then they should have prosecuted him. In the absence of such, there merely exists a civil suit with nasty, unproven allegations. Further, a consent dismissal in that suit was entered. Although the consent dismissal imposed conditions upon the Applicant, it also imposed a critical condition upon the State. That critical condition was that the suit against the Applicant would be dismissed. It's the primary reason he entered into the agreement. [325]

For the Bar to impute presumed guilt due to the existence of conditions in a consent dismissal, results in circumvention of the legal impact of dismissal. The Applicant gave the State certain things in exchange for a dismissal. Both parties gave each other a "carrot" so to speak, to use sales terms. They are both equally bound. The mere existence of unproven allegations in a civil suit, even when the opposing party is the State is meaningless. He should have been admitted.

Supreme Court of Ohio, Case #97-411; Versuslaw 1997.OH.184 (1997)

OH, DOES THE OHIO BAR LOOK STUPID IN THIS CASE!

This is an attorney discipline action in which an attorney's license to practice was revoked by the Supreme Court of Ohio. I agree with the Court's conclusion, but the matters involved also demonstrate colossal incompetence on the part of the Ohio judiciary. The attorney was admitted to the practice of law in 1986. In 1994, (eight years later) the Admissions Office received correspondence alleging that he had never received a law degree. The allegations proved to be accurate. He had only completed 77 of 86 semester credit hours required at law school and had not fulfilled his writing requirement. In his 1986 application to take the Bar exam, he represented that he would be receiving his degree in May, 1986. He never informed the admissions committee that he had not graduated from law school and the admissions committee screwed up by not verifying that he graduated.[326]

The Court renders its decision in 1995. It revokes his law license on the ground that he had never graduated from law school. Nine years after his admission!! The admissions committee obviously looked like fools and imbeciles. They didn't do their job. They're so worried about pursuing trivial nondisclosures related to residence addresses, unpaid debts, civil suits, employment records and the like, which are in fact immaterial and unconstitutional inquiries, that they didn't verify what is most important. They didn't verify whether this Applicant had graduated from law school. Perhaps the absolute most material matter regarding admission to the Bar.

Clearly, they need to put their time to more diligent use by verifying information that is important, instead of wasting time and resources on petty, immaterial matters. One other interesting question for reflection in this case. To the extent this attorney represented clients during the period 1986 - 1995, were they represented by an attorney?

1995.OH.39 (1995)

PETTY LITTLE JUDICIAL MINDS

The Applicant in the prior case was admitted to the Bar, even though he had never graduated from law school. His law license was not revoked until nine years later.

In this case, an Applicant who did graduate from law school and has no criminal convictions, is denied admission. The reasons are allegedly his "poor employment history," financial irresponsibility, and failure to pay parking tickets and other traffic violation fines. He had $65,000 of debt, of which $51,000 consisted of student loans.

In 1984 (more than ten years before the Court's opinion) he was discharged from employment at a pizza restaurant. Yes, you read that right! This becomes an issue during consideration of his application. Discharge from a PIZZA RESTAURANT!! In 1990, he was discharged by Ohio State University where he worked, on grounds later determined to be meritless in arbitration. He was discharged as a security guard in 1987 for sleeping on the job and discharged from a job in 1993 for failing to provide verification of a missed work day. From 1987 - 1993 he accumulated approximately 24 parking tickets. In 1994, he continued to drive his auto after the insurance lapsed and was in a minor collision in which he agreed to pay $ 3,100 in damages.

That's what they got on this guy. Parking tickets, some jobs that didn't work out, and driving without auto insurance. The Committee denies his application and the Court agrees. The opinion characterizes these matters as follows:

> "The board noted in its report that the combination of <Applicant's> financial difficulties, **cavalier disregard of parking laws and rules**, **continuing and ongoing employment difficulties,** and, most importantly, exhibition of gross irresponsibility in operating an automobile without insurance, created "significant questions in the board's mind as to whether or not he has demonstrated the requisite character and fitness for present admission." [327]

The Applicant should irrefutably be admitted and the Board should show remorse. My commentary can best be summarized by referencing the prior case discussed. I submit as follows:

> "The Board and Court's thorough disregard for protecting the interests of the public by allowing an individual to be admitted to the Bar who had never graduated from law school in **1995.OH.184 (1995) (versuslaw)**, exhibits a gross irresponsibility in administering the bar admissions process and creates "significant questions in the public's eye" as to whether or not the Board and Court possess the requisite character to properly administer the admissions process.
>
> The further attempt by the Board and Court to protect the economic interests of Ohio attorneys by assessing the Applicant in this case through utilization of misleading and untruthful characterizations, characterized by their general lack of candor, and coupled with a gross irresponsibility in administering rules pertaining to the admissions process, further raises a "significant question" in the public's eye as to whether the Ohio Supreme Court should be divested of its power to assess Bar admissions and regulate the legal profession.

Supreme Court of Ohio, Case No. 97-412 ; Versuslaw 1997.OH.170 (1997)

DON'T TRUST THE OHIO LAWYER's ASSISTANCE PROGRAM

The Applicant appears to have had one criminal conviction based on facts set forth in the Court's opinion, which are presented in a rather hazy and unclear manner. The opinion makes reference to a "traffic offense conviction," but in a possible attempt to "mislead" the reader, "omits" to disclose the nature of it. As a result of that "conviction," the Applicant was required to attend a driver intervention program at which he was assessed as "alcohol-dependent."

The opinion also states he was involved in "various" alcohol-related traffic incidents from 1983 through 1995. The Court's opinion "omits to disclose" the precise number of incidents. The Applicant made an appointment with the Ohio Lawyers Assistance Program for an assessment regarding his treatment. During the interview, he admitted he was using cocaine. **The Ohio Lawyers Assistance Program then apparently informed the admissions committee of this fact.** The Board denies admission and the Court agrees. The opinion states:

> "The panel found that following his interview applicant began the treatment program, during which he admitted that he was using cocaine, a fact not revealed to the committee. . . ." [328]

This case enacts an important rule not only for Ohio Bar Applicants, but also licensed Ohio attorneys. It is a simple, straightforward and clear cut rule. DON'T TRUST THE OHIO LAWYERS ASSISTANCE PROGRAM. The whole concept of these types of programs is that they are supposed to help people in need of assistance for alcohol, mental or drug abuse. Once the Program violates the participant's confidence that they can disclose matters confidentially for the purpose of receiving help, the program's entire credibility is destroyed. So remember. This case stands for the premise. DON'T CONFIDE IN OR TRUST THE OHIO LAWYERS ASSISTANCE PROGRAM!! They're simply seeking to gather information that can be used against you.

The Applicant should have been admitted. The Court's opinion, in the manner it characterizes "various" traffic offenses is misleading, evasive, and lacking in candor.

Perhaps the Judges should participate in the Ohio Lawyers Assistance Program.

Supreme Court of Ohio, Case No. 97-413; Versuslaw 1997.OH.188 (1997)

Here's another case demonstrating the stupidity of the Ohio judiciary. The Applicant was denied admission on character grounds. The Court's analysis of his character begins as follows:

> "The panel received evidence with respect to applicant's employment as a legal assistant with a Columbus, Ohio law firm, events leading to his termination from that firm, **and the manner in which he described these events** on his application for bar admission. Specifically, the panel received evidence about the applicant's keeping of time sheets, **his attitude toward the tasks assigned him,** his tardy filing of documents with the court, and the quality of his work. **There was further evidence that applicant had falsely answered a question on his admissions application."** [329]

In reference to the last sentence above, the Court "omits" to disclose the nature of the alleged falsely answered question, which appears to be an attempt on their part to "mislead" the reader, coupled with an "intent to deceive." At best, this portion of the opinion is "evasive." In reference to the job termination, the matters are petty and irrelevant. Employers and employees often don't get along. It was a bad match. The phrase "his attitude toward the tasks assigned him" is ridiculous. Maybe he was working for a bunch of jerks. In view of the fact, that they were members of the Ohio Bar it is certainly a possibility. In reference to the phrase, "his tardy filing of documents with the court," my understanding of the legal profession is that the licensed Ohio attorney has ultimate responsibility to ensure documents are timely filed, not the nonattorney legal assistant.

And finally, in reference to the phrase "the applicant's keeping of time sheets," please Ohio judges, let's be real on this one. In view of the gross over-billing with respect to time sheets that law firms in this nation regularly perpetuate on clients; a denial of admission loosely predicated on an alleged "time sheet" issue, is at the very best an example of "judges in glass bars throwing frivolous moral character stones."

Supreme Court of Ohio, Case No. 97-409; Versuslaw 1997.OH.235 (1997)

NEVER SAY NEVER; OR FOREVER

This case provides another embarrassing example of the Ohio Bar's incompetence and bolsters my claim that by concentrating their limited resources on petty matters in admission proceedings, they ultimately screw up on serious issues. It is a disciplinary case.

The Applicant represented to the Wayne County Bar of Ohio that she was admitted to the practice of law in Tennessee. She did not mention that she was under suspension in Tennessee and that the reasons for her suspension were quite serious. Subsequent to acceptance into the Wayne County Bar Association, matters giving rise to her Tennessee suspension came to the attention of the Ohio Bar. She was then asked to resign from the Wayne County Bar and the Court held that she was "forever" precluded from reapplying for the "privilege" of practicing law in the state.

The fact is that she never should have been admitted in the first place. The Wayne County Bar carelessly failed to verify the status of her Tennessee license. As a result, they looked like fools for admitting an individual whose disciplinary record manifested serious breaches of the ethical rules of conduct. An Applicant's disciplinary record in another state should not only be disclosed, but more importantly it needs to be verified by the admissions committee.

Although, I would not have admitted her, the Court's opinion that she is "forever" precluded from reapplying for the "privilege" to practice law is totally ridiculous. First of all, practicing law is a constitutional Right for those who are qualified and not a Privilege. Leaving that age-old dispute behind however, the notion of "forever" is ludicrous. If 10 years go by, or perhaps substantially less, during which the Applicant has a clean record and engages in significant community activities or something demonstrating rehabilitation, the Court is going to look awfully foolish reflecting back upon its' notion of "forever."

Pragmatically speaking, the Judges that wrote the opinion barring her "forever" may not even be on the Court, if she reapplies in the future. Their replacements would likely and hopefully recognize the stupidity of their predecessor's "forever" notion and under the proper circumstances might admit her. In summary, after addressing the Wayne County Bar's embarrassing screw up of admitting her initially, the Court corrects their foul-up, and then messes the situation up again. [330]

Versuslaw 1998.OH.42181 (1998)

THE BUFFALO BILLS AND STATE BAR ADMISSIONS

The Applicant applied for admission in 1997. In 1985 and 1986 he was convicted of driving under the influence. In 1993, he was arrested for criminal trespass and attempted burglary. The charges were dismissed and expunged. The facts of the incident were as follows.

While celebrating a Buffalo Bills football victory he consumed alcoholic beverages. While walking from one bar to another, he went behind a house and urinated in the backyard. He then saw a Christmas wreath on the front door with the Buffalo Bills logo on it, broke the window of the door and stole the wreath. He then walked down the street with the wreath on his head. At the Bar Hearing, he described his conduct during the incident as "rambunctious." The Bar panel rejects him and the Court agrees. They conclude that he had an existing and untreated alcohol abuse condition and therefore lacked the requisite character to practice law. It's a crappy opinion supported by crappy reasoning.

I definitely would admit the Applicant. The 1993 incident must be disregarded because the charges were dismissed and the record expunged. Based on the facts presented, I do believe his conduct was somewhat more serious than merely "rambunctious," but not serious enough to warrant denial of admission. The fact that the matter was dismissed is dispositive in any event. If he had been convicted, a more comprehensive analysis would be necessary. It appears that I have a substantially greater degree of faith and confidence in the disposition of criminal matters by Courts than the Ohio Bar admissions committee.

The 1985 and 1986 incidents did however, result in convictions. They are serious, but by no means heinous. They did not involve any intent to physically harm anyone or personally profit at the expense of another. Although the incidents could have resulted in serious, unintentional harm if he had been in a car accident, the fact is that such did not occur. The convictions are a product of his own frailties and weaknesses, which most of us have in some way or another. There does not appear to be any evil intent involved. Over ten years had lapsed since those two convictions. The time lapse is sufficient considering the nature of the offenses and I would admit the Applicant. [331]

I wonder if he started rooting for a different football team.

Supreme Court of Ohio, Case No. 97-1927; Versuslaw 1998.OH.52 (1998)

TAKE A HIKE OHIO STATE BAR

The Applicant, essentially told the Ohio Bar and Judiciary to take a hike. While I am curious to know his reasons, I like his style in any event. He applied to take the February, 1996 exam. Two members of the Admissions Committee interviewed him and recommended that his application be disapproved. He then appealed. The Court states in an opinion that is approximately one page in length:

> " When a panel of the Board . . . attempted to notify appellant at his last known telephone number . . . of the hearing scheduled on his appeal, it was unable to contact applicant. At the bar association's request, the panel . . . **secured an order requiring applicant to submit to a psychological examination.** Applicant failed to appear for the examination.
>
> The chairperson of the panel then contacted applicant by telephone in New Jersey, ... Applicant informed the chairperson that he did not intend to continue his efforts to be admitted to the Ohio bar. Subsequent attempts to contact applicant by certified mail have been returned "unclaimed," and subsequent notices sent to applicant by regular mail have not been returned.
>
> . . . . he is not permitted to reapply for admission to the bar of Ohio." [332]

While one can not be certain, based on the "omission" of "material" facts from the opinion by the Court,, it appears this Applicant just got fed up with the Ohio Judiciary's nonsense. The so-called "Order" requiring him to appear for a psychological examination was in all likelihood nothing more than a McCarthylike tactic intended to be used for the purpose of breaking his will. He probably recognized this and properly declined to continue participation as a party to their petty little Judicial and State Bar mind games.

Supreme Court of Ohio, Case No. 98-51 ; Versuslaw 1998.OH.88 (1998)

IF YOU'RE OVER 40 YEARS OLD, YOU'RE IN TROUBLE

The Applicant failed the 1965 and 1966 Bar exam. He then applied to take the 1993 and 1994 Bar exams (almost 30 years later) and was denied the Right to do so on character grounds. Specifically, the opinion states:

> "The panel found that the information provided by applicant in his application was incomplete with respect to his employment history, his financial history, and the status of his back child support. The panel found that applicant **disclosed neither a business consulting position nor a real estate sales position that he had held.** In addition, applicant had at least one judgment taken against him, which he did not list and about which his testimony was unclear. Applicant also did not list a business that he had owned . . . . "

The opinion does not list his age, but if we assume that he was at least 24 in 1965, he must have been at least 52 at the time of the 1993 application. The question I ask for reflection is simple. Who can document their entire life at age 52 or older? At age 40 or older? It's a ridiculous requirement. People change jobs. If you change jobs a lot, you lose track of the dates. Small civil suits, even when they result in a judgment, are forgotten after a certain number of years. Who can document all aspects of their financial history? Hell, the IRS doesn't even require an individual to go back as far as the Bar demands.

The Court's opinion is meritless. The problem in this case is a reflection of the Bar application questions, not upon the Applicant's character. They are asking questions that are vague, ambiguous and most particularly in this case, OVERBROAD. It is an unreasonable requirement to demand someone go back 30 years or more in their life for anything other than conviction of a crime. People never forget when they've been convicted of a crime. The Court denies admission, but permits the Applicant to reapply. A stupid-ass Dissenting opinion would not even allow him to reapply. The Dissent states:

> "I agree with the majority in disapproving the application for admission, but I would not allow the applicant to reapply. . . . He has demonstrated that he is not qualified **to reach the high ethical standards demanded of our bar."** [333]

The Ohio Bar's ethical standards based on its' admissions process are not so much "high ethical" standards as a sad and pathetic joke. This I find to be supported by the repeated lack of rationality in their opinions. They're really nothing more than a frivolous concoction of judicial hogwash. Such being the case, the Dissent's assertion that the Ohio Bar has "high ethical standards" must itself be construed as "lacking in candor," "misleading" and "untruthful." To the extent the Dissent fails to state any facts of any nature supporting its irrational conclusion that the Ohio Bar has "high ethical standards," its opinion is also "evasive."

Supreme Court of Ohio, Case No. 97-407; Versuslaw 1998.OH.36 (1998)

LITTLE STATE SUPREME COURT JUSTICES LOSING THEIR TEMPERS

This opinion contains three substantive paragraphs. The first delineates basic information such as when the Applicant applied for admission and when his appeal was filed. The third paragraph is four sentences long and states the Court's conclusion, with the last sentence reading as follows:

"Applicant is **never to be admitted** to the practice of law in Ohio."

A rather emotional judicial sentence. These are a group of Judges who are definitely hot under the collar. Why? Well, the second paragraph which is comprised only of conclusions, and notably lacking in factual information to support those conclusions, reads as follows:

> ". . . the panel found that applicant was not truthful, that he repeatedly lied under oath, that he lied to each group interviewing him, including the board's panel, as well as in depositions and transcripts introduced into evidence, and that he purposefully omitted relevant information from his Bar Application. **Further the panel found that applicant saw himself as the focus of a conspiracy by the . . . attorneys, and court reporters and took retaliatory action against those he perceived as his enemies, that he has no sense of obligation to the judicial system or those connected with it, that he does not handle his finances in conformity with standards required of attorneys, that he has demonstrated a willingness to subvert the judicial process in ways that cannot be tolerated, and that his attitudes, which are pervasive and ingrained, are wholly inimical to the practice of law. . . ."** [334]

It would appear that this Applicant ruffled more than a few pompous Ohio judicial feathers. Naturally, I am hopeful the Ohio Judges have calmed down a bit when they read my commentaries on their cases, or they may not want to admit me into their Bar for publicizing their little judicial temper tantrum. In so far as the substance of their "opinion," it lacks factual information to support the hyper-emotional conclusions reached by the Court. The Judges just seem to have lost their little tempers a bit. In so far as their assertion that the Applicant is "never to be admitted," well, you never know. The admissions process can always be changed and State Supreme Court Justices can be removed from the bench.

The above paragraph was the last thing I wrote about this case in 1999. I had intended to write no more. The title I gave this case, "*LITTLE STATE SUPREME COURT JUDGES LOSING THEIR TEMPERS"* was included in what I had intended in 1999 to be the final version of this case's presentation. At that time, I also noted above that "These are a group of Judges who are definitely hot under the collar." The Court's opinion was extremely short and presented virtually no facts of any nature. Yet, I had a general sense and feel of what was going on in this case. It was simply an issue of clashing personalities.

In September, 2000 I obtained some new and additional information about this case, that inspired me to write more about it. It confirmed how correct my initial reading was, and also confirmed to me that the Applicant in this case, was in fact the focus of a conspiracy against him as he correctly asserted to the Supreme Court. Frankly speaking, I was amazed myself to find out just how "hot under the collar" the Little Ohio Supreme Court Justices really were. I can't believe they went as far as they did. I've certainly not read any other case, in any other state where such vindictive action occurred. The new information I obtained was as follows.

Subsequent to the Ohio Supreme Court's "so-called" opinion, the Ohio State Medical Board instituted proceedings against the Applicant to revoke his podiatry license. The revocation proceedings were based solely on the Bar admission proceedings. No medical standard of care issues were raised.

His podiatry license was ultimately revoked. This unfortunate individual who does not appear to have ever been convicted of any crime of any nature, not only failed to gain admission to the Bar, but due to the irrationality and obvious emotional imbalance of the Ohio Supreme Court Justices, ultimately lost his professional license to practice podiatry. He appealed revocation of his podiatry license on very solid legal grounds. Naturally however, since the Bar, Court and Medical Board were now all aligned against him, he didn't have a chance.

He correctly contended that the evidence relied upon by the Medical Board was not reliable evidence. That evidence consisted of the Ohio Supreme Court's order denying him admission to the practice of law, and the State Bar's self-serving report. The Court unsurprisingly irrationally concludes that it was reliable evidence.

He contended that the evidence consisted mainly of summaries and conclusions that were unsupported by the facts and based in large part on hearsay. The Court holds that the hearsay rule is relaxed in administrative proceedings.

He contended that his actions did not constitute the crime of perjury, and further noted in support that he was never charged with perjury or falsification. The Court holds that an actual criminal charge was not required to support the board's conclusion that he committed perjury and falsification. Obviously, the Bar, Board and Court prefer to make their own unsupported, self-serving determination, rather than submitting the matter to a jury.

He correctly contended that the Medical Board should not be entitled to rely on any findings in the Bar application proceeding. He asserts such based on the fact that in the Bar proceeding he carried the burden of proof, but such is not the case in the medical proceeding. The Court holds that the Medical Board is entitled to rely on such.

He contended that the Medical Board violated his due process rights by improperly focusing on his civil litigation history. The Court asserts that his due process rights were not violated.

The Court's Medical license revocation opinion, notably includes a blatantly false statement. It is an absolute lie reflecting adversely on the moral character of the Ohio State Supreme Court Justices. The opinion states:

> "As noted by the hearing examiner, **the Ohio Supreme Court is the ultimate authority of law in the state of Ohio."**

This is clearly a State Supreme Court in need of an appropriate attitude adjustment. They are NOT the ultimate authority of law in Ohio. Rather instead, they are a branch of government that is co-equal to the Executive and Legislative branches of government in Ohio, each of which has substantial duties and power pertaining to the law. Additionally, the authority of the Ohio Supreme Court is BELOW that of the U.S. Supreme Court which is the ultimate authority of law in the state of Ohio and every other state. Additionally, the Ohio Supreme Court has only limited rather than ultimate authority regarding issues of federal law in Ohio; the predominant authority with respect to such being vested in the Federal District Courts and Federal Court of Appeals in Ohio. The Ohio Supreme Court Justices LIED by falsely stating they were the "ultimate authority of law."

This unfortunate Applicant was undoubtedly the focus of a conspiracy, as he correctly asserted. I originally suspected such before even reading the medical license revocation case. You can sense the emotional hyper-sensitivity of the Justices in the Bar admissions opinion. The medical license revocation case was just nothing more than Bullshit. No medical care issues were raised and he was never convicted of a crime. They were all just pissed off at him. The State Supreme Court Justices looked like a bunch of Jackasses, and succeeded only in documenting reasons why the public should not have faith or confidence in Ohio Courts. I have never participated in a litigation in Ohio, as either a party or attorney. My conclusions are based solely and exclusively on reading the "so-called" opinions of the State Supreme Court. And now, I bet they're hot under the collar about me.

Supreme Court of Ohio, Case No. 98-44 ; Versuslaw 1998.OH.101 (1998)

DON'T RELY ON LETTERS FROM THE OHIO JUDICIARY REPRESENTING THAT YOUR APPLICATION IS APPROVED

I am unable to ascertain how the Ohio judiciary can adopt such incredibly stringent standards, while it simultaneously and repeatedly continues to make so many embarrassing screw-ups of its own. This is another great case from a transparently, incompetent State Judiciary. The opinion's second paragraph reads:

> "In a letter . . . the **clerk's office notified applicant that he had been approved for admission** without examination and that he would be contacted by the assignment clerk regarding his presentation to the court in accordance with Gov. Bar R.I(9)(G)."

They approved his application for admission. Or did they? The next paragraph reads as follows:

> ". . . **prior to** applicant's presentation to the court and **administration of the oath of office as an attorney, the . . . Commissioners on Character and Fitness . . . decided to investigate** a report that applicant had permanently left the state of Ohio. . . ." [335]

So the guy moved his residence? What's the big deal? The Court concludes that he failed to notify the Supreme Court of his residence change and on that basis revokes approval of his admission. In so far as their letter indicating he had been approved, it would have to be construed at a minimum as "misleading."

87 Ohio St. 3d 122 (1999)

1999 was definitely a year in which the State Bars and Supreme Courts went irrationally berserk in cases involving the admissions process. This case is a good example.

The Applicant was denied admission by both the Bar and Supreme Court because his former girlfriend charged him with menacing, and theft of her cat. The charges were dropped. He also received two traffic citations in 1996 and one in 1997. He was also charged with trespassing by attempting to recover his automobile from a transmission shop, but no conviction resulted. Lastly, during a deposition he engaged in what the Court calls an "acrimonious colloquy with Judge . . . because she declined to allow his sixteen year old daughter to act as his assistant during the deposition." The Ohio Supreme Court writes one of its standard irrational opinions on Bar admission concluding as follows:

> "applicant is never to be admitted to the practice of law in Ohio." [336]

As the Courts tend to make more and more irrational statements, it is difficult to maintain any semblance of respect for them. My response to the Ohio Supreme Court's ridiculous assertion that the applicant is "never" to be admitted to the practice of law in Ohio is as follows:

> "The Ohio Supreme Court is never to have its opinions given any respect by the general public, until it stops conducting itself like chop-busting pricks."

87 OHIO ST. 3d 53 (1999); No. 99-506

IT'S THE OHIO SUPREME COURT THAT'S NOT "WORTHY"

I present this case for the State Supreme Court's use of one single term. The Bar and the Court deny admission, but give the Applicant permission to sit for the Bar exam in the year 2000. The Dissent would not even allow such permission in the future. The Dissent writes as follows:

> "The applicant cannot demonstrate he has the requisite fitness or moral character to uphold the high ethical standards required of this **worthy** profession." [337]

The term used was "worthy." As already discussed herein, it was the term used repeatedly in the 1930 issues of the Bar Examiner to promote racist notions of the Judiciary and State Bars. If the Dissent in this case, had simply used the phrase "honorable profession," or "learned profession," I would have just given my standard laugh of disbelief since no one in society believes the legal profession is anything other than scummy. However, by using the term "worthy," the Dissent has in many respects explained virtually every one of the contemptible Bar admission opinions of the Ohio Supreme Court. It all goes back to the early issues of The Bar Examiner magazine from the 1930s presented herein.

Supreme Court of Ohio, Case No. 98-1772 ; Versuslaw 1999.OH.42041 (1999)

THEY JUST BUSTED THIS GUY'S CHOPS AND TO DO SO, THEY HAD TO FALSELY CHARACTERIZE THE RECORD

In 1996, the Applicant who was approximately age 30 applied for admission to the Bar. After a personal interview, his admission was recommended for approval. Subsequently, the admissions committee received a letter from a backwoods, hick municipal Court Judge in West Virginia that asserted the Applicant had attempted to circumvent a driver's license suspension order when he was age 16 and age 19. The committee investigated further and determined that the Applicant had also failed to disclose he had been suspended from high school for fighting and was placed on probation by the juvenile court for such. His admission to the Bar was denied and he appealed.

On appeal, the Applicant contended that the past matters were "very remote" in time and that his omissions were inadvertent. He was absolutely correct. The piddly matters in question all occurred over ten years prior to his application, when he was just a rambunctious teenager. The Applicant also asserted that the West Virginia judge was conducting a vendetta against him, which appears to be quite correct. The Ohio Supreme Court denies admission by falsely characterizing the foregoing little piddly crap matters, as "serious omissions," and "false statements," indicating he lacks integrity.

The Ohio Supreme Court's false characterization of these matters reflects adversely on their moral character. The Bar admissions committee and State Supreme Court Justices were really nothing more than chop-busting, irrational jackasses. They should be “forever” banned from assessing the moral character of other individuals. [338]

Supreme Court of California, #S068704 (8/14/2000)

This case is a California case, not an Ohio case. It therefore probably belongs in the California section of this book, but I decided to make one exception and put it in the Ohio section. It demonstrates how arbitrary the admission decisions are and how the states are so different from each other. It is an unbelievable case. Try comparing it to the Ohio cases you've just read. It's like going from one end of the arbitrary spectrum to the other end of the arbitrary spectrum.

In this case, the State Bar hearing department of California recommended that the Applicant be admitted to the practice of law. The State Bar review department adopted the decision. Now the facts, which are nothing short of incredible, particularly considering that admission was recommended by the State Bar.

In 1975, the Applicant killed his sister and was convicted of voluntary manslaughter. In 1973, he pled guilty to forgery. He subsequently was convicted of forgery on two other occasions. In 1978, he pled guilty to reckless driving. Several months later in 1978, he pled no contest to another DUI. In 1981, he pled guilty to possession of heroin. In 1981, he also was convicted of another DUI. In 1990, he pled guilty to five misdemeanors including driving with a suspended license, and three counts of willfully violating a written promise to appear. In 1992, he pled guilty to three counts of willfully failing to pay traffic fines.

He had a total of 17 criminal convictions. On his Bar application, he disclosed only four of the 17 convictions. He failed to disclose 13 criminal convictions. Yet, the State Bar recommended that he be admitted. Try reconciling such a recommendation with the Applicants in the Ohio cases who were denied admission on piddly little matters. I conclude by noting that the California Supreme Court ultimately and admirably did <u>not</u> adopt the recommendation of the State Bar. The Applicant was not admitted. But how could the California State Bar possibly have recommended admission? There has to be a rational median between the irrational Ohio State Bar and the irrational California State Bar. [339]

OREGON

318 P.2d 907 (1957)

USURPATION OF THE U.S. SUPREME COURT

I have previously discussed the Konigsberg I and II cases at length in the section on U.S. Supreme Court cases herein. This remarkable Oregon case took place after the decision in Konigsberg I, but before the decision in Konigsberg II. The Oregon Supreme Court's decision is arguably in compliance with Konigsberg II, but irrefutably not in compliance with Konigsberg I. Since the Konigsberg II decision had not been rendered at this juncture, the Oregon Court's decision is particularly startling. While virtually all people familiar with State Bar admissions topics are familiar with the Konigsberg cases, few I believe are aware of this case. It is certainly an embarrassing opinion for the Oregon Supreme Court. The opinion states:

> ". . . On October 10, 1956, we rendered a decision in this case denying the petitioner's application for admission to the bar. . . . **On May 13, 1957, the Supreme Court of the United States, 353 U.S. 952 . . . granted certiorari and ordered :**
>
> > **"The judgment of the Supreme Court of Oregon is vacated and the case is remanded for reconsideration in light of Konigsberg v. State Bar of California . . .** and Schware v. Board of Bar Examiners of New Mexico. . . . **See also Brinkerhoff-Faris Trust & Sav. Co. v. Hill** . . . ."

The Oregon Court apparently was under the belief that it didn't need to obey the U.S. Supreme Court and discounts their Order by stating:

> "The case of Brinkerhoff-Faris Trust & Sav. Co. v. Hill, referred to in the Supreme Court's order, is not pertinent here."

Presumably, the U.S. Supreme Court included ***Brinkerhoff*** in their Order specifically because they were of the opinion it was pertinent. Otherwise, they wouldn't have included it in the Order. The Oregon Court's opinion closes as follows:

> "In the present instance the Supreme Court has not held that the decision heretofore rendered by us did in fact violate the petitioner's constitutional rights, but only that this was a question for our re-examination in the light of the Schware and Konigsberg cases. **The additional study we have given the case has been devoted solely to that issue, and has brought us to the conclusion that those decisions are not controlling here. We therefore adhere to our former opinion."** [340]

Stated simply, the Oregon Supreme Court pretty much told the U.S. Supreme Court to jack-off. If the ***Schware*** and ***Konigsberg*** opinions were not controlling, the U.S. Supreme Court would not have vacated the Oregon Court's decision and issued a direct Order for "reconsideration in light of ."

I do not dispute that the Oregon Court had a right to reach the same ultimate decision, IF it could substantiate such after considering the controlling cases. It is true that the U.S. Supreme Court remanded only for reconsideration in light of the those cases. I passionately contest the assertion however, that **"those decisions are not controlling here."** The facts of the ***Konigsberg*** case and this

Oregon case were remarkably similar. BOTH cases involved Bar Applicants who were purportedly members of the Communist Party. BOTH cases involved determining whether being a member of the Communist Party constituted advocating the forcible overthrow of the government. They were the most controlling cases in existence at the time.

The Oregon Court's statement that **"those decisions are not controlling here"** borders on irrational lunacy, particularly considering that their judgment was vacated and the U.S. Supreme Court's Order specifically cited the controlling cases. The bottom line is that the Oregon Court didn't like the result in the *Schware* and *Konigsberg* decisions and through the use of legal sophistry "evaded" them, and in their opinion "misled" the reader. It is a blatant example of a State Supreme Court "lacking candor" in addressing the direct Order of the U.S. Supreme Court. What would happen if citizens adopted the modus operandi exhibited by the Oregon Supreme Court in this case? The following hypothetical demonstrates:

> "Uh, excuse me, your honor, the Court's order is not controlling here and I therefore decided to ignore it."

What if prosecutors and trial court Judges adopted the modus operandi exhibited by the Oregon Supreme Court in this case? The following hypothetical:

> Prosecutor : Uh, excuse me, your honor, the Oregon Supreme Court's opinion addressing the same type of fact set as in this case, and addressing a virtually identical issue of law, and notwithstanding the fact they have directly issued an Order to you to consider, we can determine to be not controlling in this case through the use of legal sophistry and warped logic.
>
> Judge : Sounds good to me, Mr. Prosecutor. We'll ignore it and do what we want.
>
> Prosecutor : Thank you, your honor. Now, about these legislative statutes that are cramping my style. . . .

383 P.2d 388 (1963)

RIGHT DECISION. WRONG REASON

The Applicant was 34 years old and born in 1946. His parents had immigrated from the Poland-Austria area of Eastern Europe. He was honorably discharged from the U.S. Navy in 1947. He joined the Communist Party in 1949 and worked in the garment industry until 1953. He then became a longshoremen to further assist the Party. In 1957, he resigned from the Party and came to Oregon. His activities in the Communist Party included the following:

1. Attending Party meetings
2. Participating in support of candidates for public office endorsed by the Party
3. Picketing in front of the White House with respect to the Rosenberg convictions
4. Dissemination of Party sponsored literature and leaflets.

The Applicant testified that he understood the Party's position with respect to force and violence. He understood and subscribed to the position that force would be justified if a capitalistic minority resisted the efforts and frustrated the will of the majority to establish socialism. During the admissions process, he was requested by the Bar to disclose the names of any person familiar with his activities while in the Party. He refused.

He admitted that when answering a direct question under oath by the Waterfront Commission of New York, he knowingly gave false information regarding his membership in the Communist Party in order to obtain access to the New York waterfront area. In his application to the Northwestern College of Law he failed to disclose his Communist Party affiliation. He admitted during the Bar Hearings that a candid response on his law school application, would have required disclosure of his Communist Party affiliation and activities. He gave as his reason for nondisclosure, the desire to establish himself and make a new life without disclosing his past. He had also filed an application with Brooklyn Law School which included the following question:

> **"Has there been any incident in your life** which might jeopardize the recommendation by the Committee on Character and Fitness for your admission to the Bar ? . . . If so, briefly state the facts."

During the Oregon Bar Hearings, he admitted that he probably answered the above question "No" and further that he thought he falsified his application to New York University by failing to disclose his Communist Party affiliation. Here is an interesting quote from the opinion:

> "The first disclosure made by <Applicant> to anyone in Oregon of his past Party membership was to <Lawyer>, one of the partners in the firm by whom he was employed. It was made in the spring of 1959. . . .<Lawyer> . . . testified that as he became better acquainted with <Applicant>, he became somewhat suspicious of his background and thought there was a good chance it included affiliation with Communism. . . ."

Six members of the Board were of the opinion that he should not be admitted and three members were of the opinion that he should. The Court ADMITS the Applicant. The Court's reasoning is as follows:

> "The record clearly discloses misconduct which would be sufficient to disqualify a person for membership in the Oregon State Bar. The falsification of the application for a dock pass would, in itself, be sufficient to justify disqualification for such membership. <Applicant> concedes as much. But he takes the position that his moral delinquency in this respect grew out of his acceptance of communist doctrine . . . and that he is no longer subject to this deluding influence of communism.
>
> . . .
>
> **Although his initial failure to disclose the information was improper, we feel that in light of his subsequent forthrightness in voluntarily disclosing the information there was no intent to practice deception in gaining admission to the bar.**
>
> . . .
>
> We are convinced that <Applicant> is free from the Communist influences which distorted his moral judgment and that he is now a person of good moral character. Having passed the bar examination he is eligible for admission to the Oregon State Bar upon filing the prescribed oath."

The Dissent makes an important comment on the issue of disclosure as follows:

> "In fact, petitioner did not at any time voluntarily make a clean breast of his hidden activities. It was not until a member of the law firm by which petitioner was employed confronted him with a direct question which could not be evaded that petitioner finally disclosed that he had been a communist." [341]

This is an important case on the issue of disclosure. The majority rules in favor of the Applicant on the ground that there was no intent to deceive. The Dissent's point however, cuts into the heart of that argument and counteracts. I do not agree with the majority that there was no intent to deceive. I would nevertheless rule in favor of admission, on the ground that the questions at issue were unconstitutional, and as a result the Applicant's answers were immaterial. Substantial case law supports the premise that inquiries pertaining to membership in a political party, or statements of political belief are not constitutional.

The Court's ultimate decision is correct. It's reasoning supporting that decision however, is incorrect. If one accepts the majority's reasoning, and further accepts that the question was constitutional (which as indicated I do not) it gives rise to a precedent concerning the answering of Bar admission questions that can be summarized as follows:

> "Falsely answering under oath, a constitutionally valid question, is not in and of itself a conclusive ground under which to deny admission to the Oregon State Bar."

Yet, militating against such a conclusion from the majority's holding is their express statement that:

> "The record clearly discloses misconduct which would be sufficient to disqualify a person for membership in the Oregon State Bar."

I submit the latter of the two statements above, is therefore inconsistent with the reasoning used by the majority. Such being the case, I further surmise that the majority was aware the questions were constitutionally invalid, but simply wanted to avoid that issue. The end result being, they reach the correct conclusion in an illogical manner.

425 P.2d 763 (1967)

THE LAW LIBRARY BOOK HEIST??

The Applicant was denied admission to the Oregon Bar based on petty matters. He was admitted to the New Mexico Bar in 1957. The Oregon Board recommended that his application be denied pending a full-scale "adversary hearing" if requested by him. The matters at issue involved 12 charges of alleged misconduct while he was practicing law in New Mexico. The opinion by virtue of its "nondisclosure" on the topic appears to indicate that he was not suspended or disbarred by the New Mexico with respect to these matters. I surmise this based on the fact that if he was suspended or disbarred in New Mexico, the disclosure of such in the opinion, would lend substantial support to the Oregon Court's determination to deny admission, which is a questionable determination at best.

The misconduct issues concerned writing a few NSF checks, failing to return some library books, and not paying some of his debts. In addition, the opinion mentions that when he left New Mexico, he took some files with him and didn't return them until threatened with legal action by a Judge. Ultimately, he did return them and nothing more came of the matter. There is no mention in the opinion that he was ever arrested or prosecuted with respect to the foregoing matters. [342]

The Court denied admission. I would admit him. The matters apparently didn't result in any criminal charges, or any suspension or disbarment by the New Mexico Bar. They sound fairly petty in nature, particularly the library book issue which is a bit ridiculous to even include in the opinion. Most importantly however, unless the Oregon Bar has ethical rules in place requiring its licensed attorneys to pay their debts, return library books, etc., they are simply in no position to require such of the Applicant. To do so, makes them appear hypocritical by requiring the Non-Oregon Attorney Applicant to be held to a higher standard of conduct than the licensed Oregon attorney.

An obvious Equal Protection Clause violation.

541 P.2d 1400 (1975)

THE EMOTIONALLY IMMATURE JUDICIAL PSYCHOLOGISTS

The Applicant passed the Bar exam in 1973. The Oregon State Bar filed objections to his admission and a Hearing was held. The Committee then unanimously recommended admission. Neither the Applicant or the Bar argued or submitted briefs to the Supreme Court. Question 16(b) of the application inquired:

> "Have you ever been accused of, charged with, or arrested or detained for, the violation of any state, federal, municipal or other law, statute or ordinance, including juvenile or expunged offenses?"

The Applicant failed to disclose three citations for driving with a suspended license. After appearing in court where the driving while suspended citations were pending, there was apparently a covert communication from someone to the Bar. The opinion states:

> ". . . the Board of Bar Examiners, which had received letters from two sources suggesting a check of applicant's moral qualifications."

The Applicant's explanation was that he did not realize the question solicited this kind of information. I do not agree with the Applicant. The question definitely incorporated traffic offenses by virtue of the phrase:

> "accused of, charged with . . . the violation of any state . . . statute or ordinance"

Rather instead, his argument should have been that the question was constitutionally infirm in violation of the First Amendment, due to the fact that it suffered from overbreadth by encompassing matters not related to one's fitness to practice law, such as traffic offenses. In addition, the question violated the Equal Protection Clause by making inquiry of Applicants which is not required of licensed attorneys. The Committee determined that his omission was not sufficient to represent a lack of good character. A good decision on their part. The Supreme Court did not agree. A stupid decision on their part. The Applicant also had financial difficulties and was divorced. The Court apparently was displeased with the circumstances of his first marriage and divorce, even though consideration of such was inappropriate. The opinion states:

> "Subsequent to his divorce he married the woman who was the cause of his **defection** from his first marriage . . . ."

He did disclose that he was arrested at age 19 on a charge of "minor in possession of beer." Apparently, he was not convicted. Both the Committee and Court are of the opinion that matter was not significant. The Court's conclusion states:

> "We receive from the evidence an impression that the applicant is an **emotionally immature** individual and that he has developed a pattern of avoiding as long as possible any problem or stressful situation rather than trying to cope with or solve it. **He does not outright lie** about such matters when questioned, **but he is inclined to attempt to pass them off with glib, equivocal answers which put him in the best light. . . .**" [343]

The Court remands the matter back to the Board, with instructions that if after further investigation no other matters are found, he should be admitted. I would have admitted him immediately. The Court's comments are inappropriate. They smack of governmental paternalism. The admissions process should assess character on the basis of one's acts and conduct, not their attitude. The Court thinks the Applicant is "emotionally immature?" Do the Judge's have degrees in law or psychology?

The Court thinks the Applicant has a "pattern of avoiding as long as possible any problem?" Well, then the Applicant should probably be a Judge. The Court says the Applicant does not "outright lie." Good. I agree. So, admit him immediately. The Court states with disapproval that the Applicant gives "glib" answers. Too bad, if they don't like the fact that he's "glib," they'll just have to adjust. The Court says the Applicant gives "equivocal answers which put him in the best light." He'll make a great attorney!

533 P.2d 810 (1975)

STATE BARS SHOULDN'T MESS WITH CPAs

The Oregon State Bar denied admission to the Applicant who was a Certified Public Accountant, on character grounds. On his application, he did not disclose an arrest for an NSF check in 1964. No criminal charges were filed. He did disclose numerous arrests related to intoxication from 1964 to 1968. He testified that he just forgot about the NSF check arrest. It had occurred over 10 years prior to the Court's opinion. As a CPA, he wrote promotional letters to attorneys offering his services as a tax consultant. He received a warning letter from the State Board of Accountancy that such promotion was an improper solicitation of business. No formal hearing was held and no formal charges were ever filed.

The Oregon State Bar denied admission. The Court rules against the Bar and in favor of the Applicant. In my view, there is not even a scintilla of doubt that he should be admitted. It's not even a faintly close call.

What if the Applicant hadn't appealed though? He would not have been admitted, obviously. The Oregon State Bar succeeded in unjustly delaying his admission and causing him to incur significant expense. This guy had one undisclosed arrest on a fairly, minor matter. Not only wasn't he convicted, but charges were never even filed. It's a nullity. The improper business solicitation issue also resulted in no charges and no hearings. As a side-note on that issue, it is noteworthy that what the Board of Accountancy "warned" him about was later determined universally by Courts nationwide, including the U.S. Supreme Court, to be an unconstitutional prohibition of commercial speech. The bottom line is that he was fully within his legal rights on that point. [344] The Bar cost this man time and trouble for no valid reason, by abrogating their duty to fairly assess his conduct.

610 P.2d 270 (1980)

IT IS PATENTLY CLEAR

The Applicant was denied admission on character grounds related to his divorce and child custody dispute. This case is a great example of the State Bar sticking its nose where it doesn't belong. The Applicant's marriage broke up in 1978, while he was a 43 year old third-year law student. During the course of the proceedings, he made several accusations against lawyers and judges. The Court characterized them as "false" accusations, but provided no factual support for its' conclusion which must therefore be discounted as meritless.

It is noteworthy, that while the Bar and Court were quite eager to use his divorce proceedings as grounds for denying admission, they were not so eager to disclose the content of the allegations he made. It appears to be an attempt by the Court to "mislead" the reader of the opinion by "failing to disclose," "material" matters that evidences a "lack of candor" on their part. The first allegation against the Applicant was that he took his 3 ½ year old son to California, in violation of an Order awarding temporary custody to the mother. Three weeks later he was apprehended and convicted in Oregon of custodial interference. He was also held in contempt. The second allegation was that he committed perjury, related to property dispositions during the course of the dissolution proceedings. The Court's opinion characterizes it as follows:

> "Upon being ordered to answer, **he stated that he did not remember** the identity of the friends to whom he had given possession of the property. **In fact he did remember**."

The opinion further states:

> "The applicant attempts to morally justify his conduct: **his custodial interference, he asserts, was out of love for his son**: his perjury was to protect his friends from harassment. His justification, however, is simply an admission that the applicant believes it morally correct to obey a higher personal ethic than to conform his behavior to the law and to order of court. Applicant's belief directly undermines his ability to represent and advise clients, particularly in situations of stress and emotional conflict.
> **. . .**
> Regarding custodial coercion, applicant testified that he is familiar with Oregon cases in which custody has been changed, but indicates that he would nevertheless again, in a similar situation, resort to self-help rather than adjudication. For example, he testified:
>
> > **"And our Oregon courts are full of cases . . . where they have changed custody on what would appear to be less than really sound reasons. And the change of custody is harmful. . . . It's not fear of the law, or desire to be admitted to the Bar, that keeps me from taking him again. Because I don't fear that. I don't want to be admitted to the Bar so badly that if I felt my son was being mistreated and abused by my wife, ex-wife, I would not take him again. If I were informed and had reason to believe that she was doing something to him that was so harmful to him that a change of custody would be better for him than the evil she was doing, then I would take him."**

The Court's response to the above is:

> "It is patently clear that the applicant still has no understanding of the legal or moral implications of his extra-legal conduct." [345]

This author's response to the Court's statement is straightforward:

> "It is patently clear that the Oregon Judiciary and State Supreme Court have no understanding of the legal, moral or practical implications of their insistence on including matters pertaining to highly emotional child custody proceedings in a Bar admission proceeding; nor a proper understanding of the legal, moral and practical implications of their child custody laws and related court opinions. This must obviously be viewed as a deficiency in their character and indicative of their diminished mental capacities."

647 P.2d 462 (1982)

JUST ANOTHER TRANSPARENT JUDICIAL SHELL GAME

The Applicant passed the Bar exam in 1980, but was denied admission on character grounds. In 1977, while a first semester law student, he was arrested at a Salem department store and charged with theft. The charge was dismissed. The Board decided that the arrest was not a valid objection to his admission, relying primarily and correctly on the fact that the case was dismissed. The Court, apparently lacking confidence in the trial court that dismissed the case disagreed, stating:

> **"Applicant contends that the dismissal of the charge forecloses any further consideration of the incident against him. Of course, an arrest or a charge ending in dismissal does not establish that the accused committed the prohibited act. . . . As the United States Supreme Court has said :**
>
> > **"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended an offense." Schware v. Board of Bar Examiners, 353 U.S. 232, 241 . . . (1957)**

The Oregon Court addresses the <u>*Schware*</u> quote as follows:

> "On the other hand, **dismissal does not preclude inquiry to ascertain whether an offense was committed.** We recently considered a similar question in a proceeding concerning the conduct of a judge. . . . The judge argued that the dismissal precluded our consideration of the charges. We rejected this contention, concluding that it was **our duty to determine whether or not the accused had violated the law, regardless of whether criminal charges had been filed.**
> . . .
> Similarly, in this case, the trial court's dismissal of the charges in no way bars our examination of the underlying events.

The Court then goes on to determine that the Applicant did commit the theft. It also holds that acquittal in a criminal action is not "res judicata" in a Bar admissions case because the scope and purpose of the inquiry is different. The problem with the Court's reasoning is that it perverts the U.S. Supreme Court's holding in <u>*Schware*</u>. The U.S. Supreme Court did not simply say in <u>*Schware*</u> that an arrest does not prove misconduct. They said much more. They said an arrest is of:

"very little, if any, probative value"

Why impose a requirement of disclosing something that is of "very little, if any, probative value?" It is not **rational** to make an inquiry that is of very little or no probative value. There must be an ulterior motive. The professed reason given by the Court for requiring such disclosure is:

"to ascertain whether an offense was committed."

The Oregon Court has used word manipulation to circumvent the <u>*Schware*</u> opinion. They've created a circular camouflage of logic. <u>*Schware*</u> does not say <u>simply</u> that the arrest is of little probative

value. The opinion says it is of "**very little**," **"if any,"** probative value. The U.S. Supreme Court was strongly suggesting that the arrest may be of no probative value whatsoever. The fact is that State Bars include the "arrest" question on their application specifically because they believe disclosure of the arrest to be of "highly probative value."

They facially agree as a matter of form, that the arrest is of "very little probative value," but then contend that it can lead them to information that is of "highly probative value." That's nothing more than a game. **They are using a question expressly determined by the U.S. Supreme Court to be of "very little, if any probative value" specifically because they consider it to be of highly probative value.** They consider the existence of an arrest to be an essential factor in determining whether an offense was committed. Why not include a question on the application simply inquiring whether an Applicant has violated any laws, instead of asking about arrests? Let us hypothetically presume an application makes such a rudimentary inquiry as follows:

"Have you ever violated any law that has not resulted in a criminal charge, arrest or conviction?"

Would the question be constitutional? Not a chance. It would be impossible to answer. The honest and truthful answer would have to be, "I don't know." On the other hand, if the State Bar asks about violations of the law, at least they'd be getting to the heart of determining whether an offense was committed. When they inquire about arrests however, *Schware* mandates that the Bar treat the answer as having "very little, if any probative value" as to whether an offense was committed. The difference between the two questions is that an Applicant lacks sufficient knowledge to answer the former question, but the answer to the latter question, is as a matter of case precedent, of minimal probative value at best.

Two closing points on the arrest question. When the Bar or State Supreme Court finds someone committed a criminal offense even though the prosecution was dismissed, they are demonstrating an immense lack of faith and confidence in their own State trial courts. It is an inescapable conclusion that each time a State Bar independently reviews the facts and concludes an offense was committed in a case that was dismissed, they are simultaneously concluding that the justice system failed because a guilty person was not held accountable. Such being the case, the obvious conclusion comes back to the fact that the Courts are not doing their job properly. Why should the public have more faith in a State Judiciary with respect to Bar admissions, than with respect to criminal prosecutions? Determine it in Court once, and then the matter is done. Otherwise, the State Bars are exhibiting:

"very little, if any, faith and confidence in trial court judges"

Then of course there is the fantasy that one is "innocent until proven guilty," which doesn't exactly seem to fit in with State Bar consideration of mere arrests. Perhaps, it should read with respect to Bar applications:

"innocent or guilty depending on whether the State Bar likes your attitude and demeanor"

The opinion states in reference to testimony given by the Applicant:

> ". . . The applicant is intelligent, articulate, has graduated from law school, passed the Bar exam his first try . . . . The applicant wanted to muddle and confuse the record with a long-winded statement saying nothing and succeeded in doing so."

Assuming arguendo, that the above passage is accurate, my response is that the Applicant obviously possesses the qualifications to be not only a licensed attorney, but also an Oregon Judge. In 1975, seven years prior to the Court's opinion, the Applicant discharged $ 2400 in student loans. The Court states:

> "BANKRUPTCY
>
> The fact that petitioner filed for bankruptcy, standing alone, is not a factor which we consider in determining his moral fitness. **The bankruptcy statutes prevent a rule which would preclude applicant's admission to the Bar solely because he declared bankruptcy.** However, an applicant's handling of financial affairs is regularly considered in determining moral fitness. . . . **The bankruptcy statutes do not prohibit examination of the circumstances surrounding bankruptcy**, as these circumstances illustrate an applicant's judgment in handling serious obligations.
>
> The Supreme Court of Minnesota recently considered the application for admission of a person who had discharged student loans in bankruptcy. . . .
> . . .
> **Applicant had a legal right to discharge his student loans in bankruptcy as he did, and our decision herein is not based on his exercise of that right. The circumstances of his bankruptcy, however, show a selfish exercise of legal rights and a disregard of moral responsibilities.** The bankruptcy statutes prescribe only the criteria needed to discharge debts; they do not say what is required to demonstrate good moral character. . . ."

I have previously addressed in the Minnesota case, the manner in which the Courts attempt to mislead the public regarding their inquiries into bankruptcy, and see no need to repeat that analysis at length here. Succinctly stated, they do precisely what the bankruptcy statutes and U.S. Supreme Court has determined to be illegal and unconstitutional. They deny a law license on the basis of the bankruptcy. The Oregon Supreme Court opinion cited above, states in part:

> "Applicant had a legal right to discharge his student loans in bankruptcy as he did, and **our decision herein is not based on his exercise of that right. . . ."** [346]

The Oregon Court however, made an unusually careless error in this case that exposed their hand. It was like a burglar leaving his tools at the scene of a crime. It was a slip-up that I believe proves they are in fact basing their decision precisely on the "exercise of that right." It's also so incredibly simple, that it's unbelievable. Take a look at the very beginning (the first word in fact) of the lengthy citation of the Court's opinion that I have included above. **The very first word above, in capital letters, is the word, "BANKRUPTCY." It is the heading used by the Court itself, to lead off the discussion of this part of the opinion. They say it expressly. The issue is specifically the "BANKRUPTCY."**

How they could have been so stupid to do that when writing the opinion is admittedly beyond me. Once they head the section up, in capital letters with the word BANKRUPTCY, how can they possibly expect anyone to believe they are basing their opinion on anything else?

The facts demonstrate that the Court said one thing, but meant another. They were "misleading," "evasive," "omitted to disclose," "material" information with an "intent to deceive." And then they screwed up doing it. The Applicant was denied admission. He was never convicted of any crime. He had an arrest on a charge that was dismissed and a bankruptcy.

670 P.2d 1012 (1983)

HE CAN KEEP THE BOOKS WHERE HE WANTS.
THE "APPEARANCE" OF PRACTICING LAW??

This case involves a disciplinary action in which the lawyer was suspended for one year. He was a sole practitioner. He applied for reinstatement which was denied because he allegedly engaged in the unauthorized practice of law during the period of suspension. The following was included in the findings of fact adopted by the Disciplinary Board as evidence of professional misconduct:

"(3) Retaining his desk and books at his former office location;"

That seems kind of ridiculous. How can the Bar be so stupid as to fault the guy for keeping his desk and books at his former office location? He can keep his books and desk where he wants. They look like idiots. The opinion states:

> "The Trial Board also heard testimony regarding other activities giving the appearance of the practice of law."

Determining whether someone has engaged in the practice of law has been an area of heated dispute for decades, ever since the 1930s when UPL rules designed to foster the anticompetitive interests of the Bar were enacted. Now, the Oregon Court has this concept called, the "appearance" of the practice of law. What if a person wears a suit? Does that constitute the "appearance" of practicing law? Frankly speaking, it would probably be a slam dunk if the person wears a suit and tells a lie. If he acts like a Jackass, would that constitute the "appearance of being an Oregon Trial Court Judge?" The opinion further states:

> "Petitioner contends throughout these proceedings that neither the Bar nor this court has given guidelines to suspended attorneys on what action they should take regarding their clients upon suspension. . . ."

The Court then cites an ABA policy statement to support its' determination. Ultimately, the Court demonstrates the weakness and illogic of its' position by stating:

> "We are in agreement with this policy statement and **in the future** we will apply the American Bar Association's suggestion that our decisions direct suspended lawyers to take appropriate action to notify clients and counsel of a suspension."

By holding that they will comply with the ABA policy statement, "in the future" they have essentially conceded their own failure to render guidance with respect to the "present." Notwithstanding their tacit confession of failing to provide guidance, the Oregon Supreme Court denies reinstatement. It's totally irrational. They first admit that they don't have the necessary rules in place, and then they fault the guy for being a victim of their incompetence. The following sentence further demonstrates the irrationality of the Court when the economic protectionist interests of the profession are at stake. It is in reference to a suspended practitioner's telephone line:

> "We recognize it is often impossible to have a telephone directory listing changed, particularly where the suspension is for a shorter period. However, in the case of a sole practitioner it is **possible to have the service temporarily disconnected,** reserving the same number for later use, . . ."

The Court is way out of line to suggest that a suspended attorney has a legal duty to disconnect their telephone line. It then states:

> **"The degree of truthfulness expected from a lawyer is higher than that expected from others."** [347]

WHOAAA!!! Did I read that right? If that's the case, then why is it that Applicants have to disclose information pertaining to debts, civil suits, child custody proceedings, and the like, even though licensed attorneys do not have to do so? A person could be a licensed attorney for 20 years and the Bar wouldn't know squat about their debts, civil suits, etc.. If the degree of truthfulness from a lawyer is higher than that expected from others, then why is the burden of proof in a disciplinary proceeding on the Bar, while the burden of proof in an admission proceeding is on the Non-attorney Applicant??? The Court's statement was "misleading," and "lacking in candor."

754 P.2d 905 (1988)

NO OUTSTANDING CHECKS, BUT THE CASE DOESN'T RECONCILE

In the mid 1970s while a teenager, the Applicant started to smoke marijuana and then began selling it. He was arrested and charged with possession of marijuana with intent to sell. He pled guilty and was sentenced to six months in jail in 1976.

In 1977, he was arrested for breaking a glass door in the Student Union in his college and pled no contest. He sold marijuana and amphetamines on a regular basis in 1977. He pled no contest to related charges in 1977. He graduated from the University of Oregon in 1981. That same year, he pled guilty to possession of cocaine. He entered law school in 1983 and continued to smoke marijuana until 1984, at which time he stopped.

The opinion indicates that he had at least four serious criminal convictions, aggravated by numerous violations of probation. After denying admission to the Applicants described in the preceding cases for reasons such as filing bankruptcy, traffic violations, not paying debts, being arrested once even though the case was dismissed, and trying to be a good father, now the Oregon Supreme Court admits a guy with four serious felony convictions.

Frankly speaking, I would be inclined to admit this Applicant also. But that is consistent with my view in the prior cases. The Oregon Supreme Court's admission of the Applicant in this case, is wholly inconsistent with their opinions in the prior cases. Something smelled bad to me when I read the basic facts of this case. And then, I read the portion of the opinion that really explained why he got in. The portion of the opinion that demonstrates how the Bar admission process is predicated not on what a person has done, but rather on who they know. The opinion states:

> "Applicant offered several letters of reference to the Bar from people who have known him in various capacities. . . . **One was written by Robert J. Huckleberry, who is currently a district court judge and who represented applicant in his 1981 criminal case**. . . . This statement from someone who knew applicant when he was still getting in trouble is important."

The Court "misleads" the reader. The fact that the statement came from someone who knew the Applicant when he was getting in trouble was not the focal point. It was the fact that the statement came from a district court judge that was determinative. So there's the key to be admitting into the Bar. If you commit crimes, make sure you hire an attorney who will one day be a Judge. You are then home free!! The Court also states:

> **"Another letter was written by a law professor, who is applicant's father-in-law."** [348]

I submit there is no possible way to reconcile granting admission to this Applicant, while denying admission to Applicants in the prior cases with significantly cleaner records. I would have admitted them all. Oregon Judges, ya gotta admit, you're looking pretty bad here, Baby!!

782 P.2d 421 (1989)

MY LOVELY MARION COUNTY

This is a reinstatement case. The Applicant was admitted to the practice of law in 1957. He served as the Marion County District Attorney from 1965 to 1980. In 1980, he was charged with three counts of first degree theft, two counts of tampering with public records, two counts of unsworn falsification, and one count of first degree official misconduct while a District Attorney. A jury found him guilty on all eight counts. His convictions were affirmed on appeal and he was suspended from the practice of law. In 1987, he petitioned for reinstatement. The Bar filed a Statement of Objections and the trial panel ruled against him. In May, 1989 he filed a Petition for Modification of the Panel Decision requesting reinstatement. The Oregon Supreme Court's opinion states:

> "The trial panel concluded and we agree with its conclusion that:
>
> **"<Applicant> believes he was wrongly charged and convicted of the felony."**
>
> Applicant states that he does not believe he is guilty of the crimes for which he is convicted. He argues that **it would not make him a better lawyer or demonstrate better character to acknowledge "a degree of guilt he did not truly feel or believe."** He states that the record is not clear how much money he used illegally. He offers letters from "experts in fiscal accounting and audits," apparently to persuade us that his 1980 jury convictions were wrongful or to minimize the extent of his crimes or both. . . .**He also argues that he has grounds for post-conviction relief "because his trial attorney was unprepared and did not even appear on every day of the trial.**
> **. . .**
> We find instructive the comments of the trial judge who sentenced applicant in 1980. . . . :
>
> > "the trial judge stated that this was not simply a case of theft and it was not simply a case of theft by a person who happened to be in a public office . . . it's a case of theft of government funds . . . . And his office was the chief law enforcement office of Marion County."

The opinion later states:

> **"A circuit judge states that, . . . the judge does not feel that applicant was guilty of the crimes of which he was convicted. Another circuit judge states that applicant's conviction was an "aberration." He feels that people were surprised when applicant was convicted and that, "perhaps all the evidence did not come out."** . . . A third circuit judge, without commenting on applicant's 1980 convictions, also supports reinstatement. An attorney who has known applicant for many years states that he does not believe that applicant was guilty and that applicant has expressed remorse. . . . A third attorney opines that there is a basis for applicant's post-conviction claim of **ineffective assistance of trial counsel in 1980."**

Footnote 7 of the opinion states:

> "Applicant contended that 1980 summary suspension violated due process, equal protection and separation of powers under the state and federal constitutions; that the **trial panel was biased** and employed the wrong standard in evaluating his evidence of rehabilitation; . . . .
>
> In July, 1988, applicant filed a petition for post conviction relief alleging that he was denied effective assistance of counsel in the 1980 criminal proceedings because: **his trial attorney failed or neglected to adequately prepare for trial, investigate the charges, interview and use available witnesses, use available records and documents in applicant's defense, challenge the prosecution's records "now known to be erroneous and false," complete discovery, and obtain required and needed documents prior to trial. . . ."**

Footnote 8 states:

> **". . . a key witness against applicant at his 1980 criminal trial, was herself convicted in 1982 of embezzlement . . . from the Marion County Juvenile Department**. **She was also convicted in 1988 in Douglas County of Theft in the First Degree** and was sentenced to five-years bench probation. . . ." [349]

I am undecided whether I would grant reinstatement. The existence of a criminal conviction is generally the benchmark I use, and that militates strongly against reinstatement. It is not however, totally conclusive on the issue. Two points merit consideration.

First, if one is convicted by a jury, should they even be allowed to assert innocence in a Bar admission proceeding? Second, does an assertion of innocence in light of a conviction constitute bad character in and of itself? My position is as follows. The assertion of innocence, even in light of a conviction, cannot fairly be deemed to constitute bad character. To do so, is inimical to American values and traditions. The Applicant should be allowed to assert innocence without fear of reprisal. The assertion however, should be given minimal weight, in the absence of substantial corroborating evidence. This stance is in accordance with the Massachusetts case of Alger Hiss previously discussed.

Note my use of the phrase, "minimal weight in the absence of substantial corroborating evidence." The facts in this case are disturbing and the whole thing does sound a bit fishy. It doesn't sit well with me that the key witness who testified against him, was herself later convicted of embezzlement. On the issue of ineffective assistance of counsel, I concede that most people convicted of crimes assert ineffective assistance of counsel. It is particularly interesting that the same Judges and Attorneys who regularly discount such claims as meritless while in office, tend to treat such claims a bit more seriously when they are the Defendant.

As to whether I would grant reinstatement, I am unable to decide without having the entire record before me. The conviction does sound fishy though.

319 Or. 172 (1994)

I present this case for one purpose only. Footnote 13 of the Court's opinion states:

"However, my research indicates that this court has never reinstated a lawyer after disbarment." [350]

If the foregoing statement was true, well then, that's just crap. I simply don't believe that in the entire history of the State of Oregon there was never a disbarred attorney who demonstrated sufficient reformation to warrant reinstatement.

838 P.2d 54 (1992)

THIS IS, THAT WOULD BE

Try reconciling this case with **754 P.2d 905 (1988)** where the Applicant with at least four serious criminal convictions, who knew a Judge and whose relative was a law professor, was admitted. The Applicant in this case, allegedly impersonated a State Senator during the course of a telephone call. The operative term is "allegedly."

The Applicant had applied for a credit card. The credit card company called where he was working to verify employment. Someone verified his employment representing themselves as the Senator. A co-employee of the Applicant testified that she saw him with a phone in his hand and he said:

"Yes, **this is** Senator . . . ."

The Applicant testified that the co-worker misunderstood what had occurred. His version was that someone else impersonated the Senator and the co-worker only witnessed a phone conversation where he said the Senator's name, but did not represent himself to be the Senator. Instead of the words "this is," the Applicant said the words he used were, "that would be" as in:

"Yes, **that would be** Senator . . ." [351]

The Applicant's position was that the evidence associating him with an impersonation gave rise to no more than a mere suspicion. He was never arrested, or charged with any crime related to this matter. The foregoing incident was the only matter causing him to be denied admission. The opinion makes no reference to any other type of negative information, such as arrests, convictions, debts, bankruptcies, civil suits. He was denied admission, in the face of what appears to be an otherwise absolutely immaculate record. The incident occurred in 1990 and the Court's opinion was issued in 1992. If he committed a crime, he should have been prosecuted. The situation is nothing more than a "he said," "she said" scenario. He definitely should have been admitted.

More importantly, how can the Court rationally justify denying admission to this Applicant, when it admitted the Applicant in **754 P.2d 905 (1988)** with at least four criminal convictions and probation violations. Oh wait, that guy knew a Judge.

856 P.2d 311 (1993)

ARE CRIMINAL PROSECUTIONS HANDLED THE SAME WAY?

Remember again the Applicant with at least four convictions in **754 P.2d 905 (1988)** who knew a Judge, and had a father in law that was a law professor. That Applicant was admitted. Compare that case with this one. The Applicant in this case, based on facts in the opinion appears to have had no criminal convictions, arrests, past due debts, or civil suits. He did however, while a Nonattorney purportedly encroach on the economic interests of the State Bar. And more importantly they didn't like his attitude. No bad acts, just what they perceived to be a bad attitude. It's worse than a criminal conviction in their irrational, petty, judicial minds. The problems apparently started when the Applicant was questioned by the Board about an insurance claim that he submitted for equipment stolen from his apartment. The Board believed the insurance claim might have been improper, but they had no concrete evidence. The opinion states:

> "In conclusion, the Board was very troubled by <Applicant's> conduct in connection with the . . . insurance claim and his explanations and answers to questions regarding that conduct. The Board felt that simply was not candid and forthcoming in his testimony and that there was far more to these transactions and events than he was admitting. We found that some of his explanations for events, **rather than revealing an eccentric personality, were both irrational and in conflict with other traits or behavior <that Applicant> exhibited, and thus incredible.** We also felt that his consistent reliance on excuses such as "sloppiness", "carelessness, . . . and **"personality conflicts"** was designed to prevent the complete and accurate explanation for his conduct. . . .
>
> . . . While the **Board is not necessarily convinced that <Applicant> attempted to defraud** the insurance company, we are left with substantial doubts about his . . . respect for the rights of others. . . ."

Cutting through the Court's basic baloney, it is clear the only problem in this case was that they didn't like the Applicant's attitude. The Court's dilemma was that they didn't have a single shred of factual evidence to hang their hat on. So they made something out of nothing as the next passage indicates:

> "In the interim . . . , Applicant assisted members of the . . . family, who were in the midst of a legal dispute dealing with a conservatorship . . . . Bar . . . claimed that Applicant had been engaged in the unauthorized practice of law by helping . . . .
>
> Applicant attempted to refute the Bar's claims. . . .He also testified that neither he nor the members of the . . . family understood that he was engaging in the practice of law. Applicant offered the testimony of several persons who testified that he was trustworthy and of good moral character."

The Court addresses the matters as follows:

> ". . . **The actions were taken in an honest desire to help a friend**. . . .But the actions raise a concern that Applicant does not feel bound by the code of conduct he would be expected to uphold as an attorney.
>
> Whether Applicant intended to commit insurance fraud is **not certain.**
> . . .
> Applicant also argues that it is **unconstitutional to place the burden on him to prove** that he is of good moral character. . . . we are not persuaded by Applicant's argument. . . .
>
> Applicant is denied admission. . . ." [352]

This is their idea of a fair admissions process. Admit the Applicant with four serious criminal convictions who knows a Judge and deny admission to an Applicant who helped a friend, even though he has no convictions, arrests etc.. To justify such hypocrisy, they irrationally defame the Applicant's integrity even though they voluntarily confess that they are "not certain." This Applicant was denied admission for one reason. The issue was "personality conflicts." The Court didn't even have the balls to admit it. In my view, the ramifications of this case go far beyond the admissions process. The question for reflection is this:

> "If Bar Applicants in Oregon are denied admission because they have had "personality conflicts" with others (particularly the Bar), or an "eccentric personality," how can the public be certain that Defendants in criminal cases are not being deprived of fair trials, due process, and being sent to prison for the simple and despicable reason that an Oregon Judges don't like their personality?"

In my view, the Oregon Judiciary played an imprudent and transparent shell game in this case.

Oregon Supreme Court, Case No. SC S43659 5/22/97 Versuslaw 1997.OR.269

DOES THE COURT REALLY WANT TO BE CORRECT?

The opinion is two paragraph long. The Applicant was a member of the California Bar and denied admission to the Oregon Bar on character grounds. The Court's reasoning is as follows:

> "A discussion of the reasons for that conclusion would not benefit bench or bar." [353]

It's my guess the Court is quite correct. That's because a discussion of the reasons for denying admission might very well reflect poorly on the Oregon Judiciary. And obviously benefiting the bench and bar was the focal point of inquiry. The public apparently was of little importance.

SC S44863 1998.OR.392

THE JUDICIARY'S INVENTIVE CONCEPT OF LYING
IT WILL BE "QUID PRO QUO" FROM NOW ON

The Applicant was admitted to the California Bar in 1984 and practiced law until 1994 when he moved to Oregon. I address two aspects of the opinion. The first concerns the following statement:

> "(N) He **lied by omission** to the Board when in his application for admission he **stated that the judgment for malicious prosecution was reversed, but did not state that it was reversed by stipulation of the parties rather than on the merits."** [354]

That's crap. The man disclosed it. It's simple as that. The fact that the Board didn't like the manner in which he disclosed it or believed the disclosure was not as full as it should have been, is garbage. If you ask someone a question and they answer the question's express inquiry, they have fulfilled their duty. If you don't ask a question, then you can't expect an answer. The Court adopts an irrational standard of disclosure. No one expects anyone to disclose something that is not specifically asked. The judgment was reversed. He said it was reversed. End of story. The concept that an individual "lied by omission" is irrational. Lies are misstatement of material facts that are spoken or written, with an intent to deceive. Silence cannot reasonably be construed to constitute a lie. The Fifth Amendment ramifications are obvious to any first semester, first year law student.

The second issue to be addressed is not quite so obvious. This Applicant was suspended by the California Bar for failure to pay child support. Most State Bars, similar to Oregon have determined that failure to pay child support is grounds for denial of admission. While I do concede there is some limited merit in such a policy, it is a rather self-defeating premise. Most non-custodial parents who fail to pay child support, simply don't have the money. The concept of promoting the payment of child support by depriving that parent of their means to earn a living seems to be rather self-defeating. It frustrates the exact foundation upon which the rule is based. In addition, while promoting the timely payment of reasonable child support amounts is a valid societal goal, it is of equal importance to ensure that non-custodial parents receive their court ordered visitation. In the absence of a Bar rule mandating admission denial of custodial parents, that fail to provide visitation to a non-custodial parent, it is inequitable to deny admission to non-custodial parents for non-payment of child support. There needs to be a "quid pro quo," recognizing the importance of both parents. Frankly speaking, my position is that messing with the Bar admissions process for the purpose of achieving unrelated societal goals is overall wrong. But if you're going to do it, you need to at least make an attempt to be fair.

Visitation is the "quid pro quo" for timely payment of child support. Favoring one over the other results in every non-custodial parent lacking complete faith and confidence in the justice system and weakens the very foundation of governmental power. There is an ironic twist, that I admittedly love, with respect to the concept of injecting the domestic relations proceeding into the Bar admissions process. **It can work both ways. Non-custodial parents who have been deprived of custody and visitation can spend the time that would otherwise have been spent with their child, by studying and learning about the inherent hypocrisies in the legal profession, including particularly the State Bar admissions process. It's my guess that when the Bars and Courts injected child custody and support proceedings into the Bar admissions process, they never fully considered how their diabolical plan could result in the divestment of their own power.**

Oregon Supreme Court, Case # SC S43201; Versuslaw 1998.OR.192 (1998)

CONDITIONAL ADMITTANCE TO CONTROL THE LAWYER'S LIFE

The Applicant, a member of the Wisconsin Bar was "conditionally admitted" to the practice of law in Oregon. I have previously expressed my reasons for believing the concept of "conditional admittance" is inappropriate. You're either in or you're out. Conditional admittance jeopardizes the ability of the lawyer's client to receive zealous representation and is merely a State Bar Machiavellian tool to control the attorney's actions. It is unacceptable. The Court conditionally admits in this case for reasons related to payment of debts including a section that is once again titled "Applicant's bankruptcy." By titling the section in such a manner, the Court once again slips up and exposes its' hand. It penalizes the Applicant for a bankruptcy, which it is prohibited from doing, by the U.S. Supreme Court. It is a usurpation of federal authority. The Oregon State Supreme Court attempts to justify their usurpation of federal authority through the use of manipulative legal sophistry and parsing the meaning of words. Their irrational attempts are lamely transparent. The Court "conditionally admits" the Applicant notwithstanding its' uncoerced confession in the opinion that:

> "There is **no evidence that Applicant has committed fraud, deceit, or any crimes of moral turpitude.** There is no evidence that Applicant has ever cheated a client nor that Applicant's handling of his financial affairs has ever left a client shortchanged."

They "conditionally admitted" this Applicant for the purpose of controlling his conduct. This is borne out by the Court's statement that:

> **"applicant agrees to use the loss-prevention services of the Professional Liability Fund"** [355]

While complete discussion of Oregon's PLF is beyond the topics herein, it is in simple terms a means used by the Oregon Bar to control their lawyers and results in litigants being deprived of zealous counsel. Specifically, the PLF imposes a mandatory requirement on practicing Oregon lawyers to purchase malpractice coverage directly from the Oregon State Bar. If they fail to purchase it, then their law license is suspended. The conflict of interest is obvious. The Oregon attorney is required to purchase malpractice coverage from the exact same Bar, that has the ethical responsibility of disciplining them for breaches of the ethical rules of conduct. How can you insure someone for malpractice, when you're also supposed to discipline them for breaches of ethical rules of conduct ?

It is my understanding, the Oregon State Bar has been the only State Bar in the nation, stupid enough to adopt such a policy. Legal considerations aside, it makes them look ridiculous.

Oregon Supreme Court, Case No. SC S45936 ; Versuslaw 1999.OR.42178 (1999)

YOU RECOGNIZED AT LEAST ONE OF YOUR SCREW UPS, DIDN'T YOU GUYS?

In the case, **1997.OR.269 (SC S43659) ,** the Oregon Supreme Court denied admission on character grounds and simply stated:

> "A discussion of the reasons for that conclusion **would not benefit bench or bar.**"

In this case, they obviously recognized the foolishness of not at least including the public in their consideration. Once again, they deny admission without supporting their decision. But they phrase their "opinion" differently this time as follows:

> "A discussion of the facts surrounding this application, and the circumstances that have led the Bar to oppose it, **would not benefit the Bar or the public."** [356]

The "public" has been substituted for the "bench." I like the concept.

OKLAHOMA

Supreme Court of Oklahoma, Case No. SCBD 3914 (1993)

OKLAHOMA, WHERE THE WIND KEEPS BLOWIN;
AND THE STATE BAR'S FULL OF HOT-AIR

This case is particularly sad and another instance of a State Bar and Supreme Court sinking so ethically low as to inject a child custody dispute into an admissions proceeding for the purpose of protecting their economic interests. Based on the Court's opinion, the Applicant appears to have had no convictions, arrests, civil suits or other issues that could preclude admission. The child custody dispute was the focus.

He graduated from law school in 1992. In 1991, he was represented by an Oklahoma City lawyer in a custody dispute involving his child. He was seeking custody because his young child complained that his mother's boyfriend hit him in the stomach with his fist. The Applicant filed a grievance complaint against the attorney who represented him. He alleged that he instructed the attorney to seek temporary custody. The attorney without consent, sought permanent custody. The Applicant asked him to withdraw the request, but the attorney refused.

The Applicant then settled the case himself. His ex-wife retained custody, visitation was curtailed, he assumed a disproportionate share of travel for visitation and agreed to pay more child support. Quite simply put, he was reamed up the butt. Apparently, sold out by his own counsel who failed to comply with his express goals and instructions, the Applicant had no choice but to then represent himself and got demolished. His problems were not over however.

The Oklahoma Bar in order to protect the attorney, informed the Applicant that his complaint did not warrant investigation. The Applicant then filed an amended grievance attaching what he represented to be copies of handwritten notes made contemporaneously. He stated that the notes had been mailed to the attorney and were returned to him after the case was concluded. The Bar forwarded a copy of the amended grievance to the attorney, who had retained copies of the notes before sending the originals back to the Applicant. The copies of the notes submitted to the Bar by the Applicant, were different than the copies retained by the attorney. The Bar and Supreme Court denied admission on the ground the Applicant was ethically unfit, based on this matter.

The Applicant attempted to explain the discrepancies by representing that he was the consummate note-taker who was continuously recopying notes to make them more accurate. He indicated that he was anxious to provide the Bar with the most complete version of the notes and that was why he redrafted portions of them. He apologized for some inconsistencies in both his submissions and testimony with respect to the notes.

I address several matters. First and most importantly, the whole case smells bad. You have here an individual who is represented by a licensed attorney in a matter that is perhaps the most important aspect of his life (his child). That attorney appears to have screwed him over royally. The attorney seems to have taken action in direct contradiction with his client's wishes and refused to correct such upon request. The Applicant filed an ethical complaint, which the Bar refused to even investigate initially. That alone, is garbage. Based on facts set forth in the opinion, the initial complaint contained matters at least warranting investigation. The attorney had allegedly failed to abide by reasonable goals of his client (i.e. temporary custody instead of permanent custody). If true, that is an ethical breach.

The Disciplinary Committee was faced with the following situation. After receiving the amended complaint, if they disciplined the attorney, they would look like idiots for not investigating the initial complaint. Consequently, in order to avoid having their own ethical shortcomings exposed, the

Bar had motive to make the Complainant (the Applicant) look bad. This would have the effect of absolving the grievance committee from their earlier abrogation of duties.

By shifting blame upon the Applicant, they succeed dually in protecting the licensed attorney who seems to have screwed over his client, and also provide their grievance committee with an effective whitewash. The Applicant in response makes an absolutely brilliant argument. He notes that Oklahoma Ethical Rule 5.4 states as follows:

> **"Matters contained in grievances** submitted to the Association, the Commission or the General Counsel, and statements, oral or written, with respect thereto, **shall be privileged**. Litigation or the threat of litigation by a respondent lawyer against a person filing a grievance by reason of such filing may be grounds in itself for discipline. . . ."

The Applicant contends that by virtue of the above phrase which reads:

"Matters contained in grievances . . . shall be privileged."

the Bar was not even allowed for purposes of assessing his character during the admissions process to consider matters related to the grievance complaint. He was absolutely correct, notwithstanding that the Court irrationally held otherwise.

The Supreme Court was in a position where they felt they had to protect the economic interests of both the admissions committee and disciplinary committee, by whitewashing the alleged transgressions of the attorney. To do so however, they had to use irrational legal sophistry to justify their own noncompliance with a validly enacted court rule. What they came up with is as follows:

> **"Our rules do not grant the broad protection applicant would invoke for himself.** At most the rule-based shield which the applicant urges today is coextensive with the common-law privilege extended to attorneys, parties and witnesses with respect to communications made preliminary to judicial or quasi-judicial proceedings."

The Oklahoma Supreme Court was simply blowing hot air. The were falsely contending that the matters were only privileged for the limited purpose of prohibiting an attorney from instituting a suit against a Complainant, but not for purpose of consideration by a Bar admission committee. The first sentence of the rule states that the matters "shall be privileged." It imposes an unequivocal, total mandatory obligation. It's simple as that. The second sentence prohibits retaliation by an attorney against a Complainant, but does not negate the impact of "privilege" delineated in the first sentence. Only an irrational reading of the Rule would suggest that the second sentence provided justification for negating the "privilege" mandated by the first sentence.

This is another blatant example of a Court that doesn't like the manner in which a validly enacted rule functions in a particular instance, and therefore rewrites the rule post-hoc to fit their immediate self-interested goals. The first sentence stated that the matters were privileged. If they're privileged, then the Bar cannot use them. Period. If Courts want the public to follow laws and rules even when people don't like the impact of such, then State Supreme Courts need to do the same.

If we assume arguendo, that the Court was correct (which as indicated, they are not), then we must similarly conclude that in enacting the rule the Court was "lacking in candor," "misleading," and "evasive." The reason is as follows. In attempting to support it's interpretation of the Rule, the Court states:

> "At most the rule-based shield which the applicant urges today is coextensive with the common-law privilege extended to attorneys, parties and witnesses. . ." [357]

If the above is assumed to be true, then the obvious question, is why didn't the drafters of the rule state that matters contained in grievances shall be accorded only a limited privilege. They didn't do that. They stated simply and expressly that the matters were privileged. Were the drafters lacking candor? Did they draft a misleading rule designed to convey an impression that grievance complaints were privileged, when in fact, they only afforded a limited privilege? What the Court did in this case was to take a rule expressly mandating that grievance matters are privileged, and rewrote it, post-hoc, to stand for the premise that:

> "Matters contained in grievances have a limited privilege that may not be construed in a manner functioning against the political and economic interests of the legal profession."

The Applicant definitely should have been admitted. The grievance committee abrogated its duty by failing to investigate the initial complaint. The Court then redrafted a Rule, post hoc, to protect the Bar's economic interests. It is noteworthy to point out, that even if the Applicant falsified the notes, his conduct in my opinion, was not quite as immoral, and certainly not as hypocritical as that of the Bar and Oklahoma Supreme Court.

PENNSYLVANIA

2001.PA.0000161; J-142b-2000 (February 20, 2001); Board File No. C1-99-785

WE'RE ADMITTING YOU, SO THAT WE CAN DISBAR YOU
(Psst: Don't worry, we're really going to let you stay in the Bar, but we have to make sure this doesn't happen again because it makes us look stupid)

This case involves a disciplinary proceeding that was instituted simply because the Respondent had been admitted to the Bar. Essentially, it involves an "Intra-Bar Power Conflict" where the Disciplinary Board didn't like the decision rendered by the Admissions Board and sought to trump that Board's decision by disbarring an attorney immediately subsequent to his admission.

The Respondent was admitted to the New Jersey Bar in 1972 and subsequently Disbarred in New Jersey in 1989 after an audit revealed a shortfall of monies in the trust account he maintained for clients. The Disbarment was based on his criminal conviction for the knowing misapplication of client funds. However, the trust fund incident does not appear to have been a product of monetary self-interest. Rather instead, what he did was to use the funds of one client to pay the expenses of another client. The New Jersey Supreme Court reported that he was proven to be an inept bookkeeper, rather than a self-interested thief. That determination appears to be quite well supported when considered in conjunction with the fact that during his years of practice in New Jersey he engaged in significant pro bono work, particularly on behalf of the homeless population in New Jersey. After moving to Pennsylvania, he continued working for community related programs through his church and provided assistance to senior citizens.

In 1992, he applied for permission to sit for the Pennsylvania Bar exam which was denied. He renewed his request in 1995. Hearings were then held to review the issue of his character, including most particularly the New Jersey Disbarment. Ultimately the Board gave him permission to sit for the exam which he passed in 1999. He was admitted to the Pennsylvania Bar in July, 1999. The Disciplinary Board apparently did not approve of the Admission Board decision, and immediately instituted reciprocal discipline proceedings based on the New Jersey Disbarment.

The Respondent predictably argued that upon having satisfied the character requirement of admission which involved full consideration of the New Jersey Disbarment, further action predicated on the Disbarment was precluded. The State Supreme Court was clearly in a difficult position in this case. Essentially, they were being asked to choose between the Admissions Board and the Disciplinary Board. The Respondent was clearly nothing more than a Pawn in major power game between the two Boards. What the Court did was interesting.

The Court rules against the Respondent on the issue of whether the New Jersey Disbarment can be considered for purposes of reciprocal discipline. It reasons that consideration of character for purposes of granting permission to sit for the Bar exam, is different than consideration of issues pertaining to imposition of reciprocal discipline. Consequently, the Court holds the Disciplinary Board was within its' power to institute proceedings against the Respondent.

Nevertheless, the Court then goes on to hold that reciprocal discipline should not be imposed upon the Respondent in this case because it would result in a grave injustice. Essentially, the Court's concept was that the proceedings for reciprocal discipline could be instituted, but the discipline itself should not be imposed based on the facts of the case. The Court then notes that in November, 1999 (immediately following the Respondent's admission to the Bar in this case), Pennsylvania Bar Admission Rule 203 was amended to read as follows:

> "An applicant who is disbarred or suspended for disciplinary reasons from the practice of law in another jurisdiction at the time of filing an application for permission to sit for the bar exam shall not be eligible to sit for the bar exam."

The Court basically plugged the hole that allowed for the Respondent in this case to apply for admission, while providing him with the benefit of retaining his admission. In the future, under the revised rule, individuals such as the Respondent in this case would not be able to gain admission to the Pennsylvania Bar. The Court also points out an interesting distinction between the practice of law in Pennsylvania and New Jersey stating as follows:

> "Disbarrment in New Jersey holds no practical opportunity for reinstatement. As the New Jersey Supreme Court noted, in the past one hundred years there have been only three orders of reinstatement following disbarrment. . . . Pennsylvania, on the other hand, contemplates reinstatement as a corollary to disbarrment. . . . New Jersey conducts disciplinary matters with more emphasis on the punitive aspects, while Pennsylvania concerns itself with punishment as a prerequisite to rehabilitation. . . . New Jersey law allows for no exception where an attorney suffers a criminal conviction, he must be permamently disbarred.
>
> In Pennsylvania, although a criminal conviction does establish an automatic basis for discipline, the extent of that disciplinary measure is dependent on the nature of the violation and the mitigating facets of each case.
> . . .
> Finally, we note that deterrence is a considerable factor in matters of reciprocal discipline. Pennsylvania will not tolerate a reputation for welcoming disbarred attorneys from other jurisdictions to practice law with impunity in our courtrooms."

Two Concurring opinions were written in this case. One states as follows:

> "Although I agree that there is no evidence that Respondent would pose a threat to the public by engaging in the practice of law at this time, the same may be said of future respondents who have been disbarred in foreign jurisdictions and will not be permitted to seek admittance in Pennsylvania under the newly adopted bar admission rule. Thus, this case should be seen for what it is -- a limited exception to what our Court has done in the past and practice that will not be repeated in the future."

The second Concurring opinion states as follows:

> ". . . I do not believe that Pa.R.B.A. 203 should have been amended to create a bright line rule that prohibits attorneys who have been disbarred or suspended for disciplinary reasons in other states from applying to sit for the Pennsylvania bar exam. Historically, this Court has taken the position that the events surrounding each particular case of attorney misconduct must be taken into account when determining the appropriate discipline. . . .The amendment . . . ignores this long-standing dictate in disciplinary proceedings. Furthermore, two of our neighboring states, New Jersey and Ohio, offer no opportunity for anyone who has ever been disbarred to petition for reinstatement. Consequently, decisions to disbar attorneys in those states will permanently preclude those attorneys from applying to sit for the Pennsylvania bar, or from petitioning for

reinstatement to the Pennsylvania bar, regardless of the circumstances surrounding their misconduct." [358]

My opinion in this case is as follows. First, I believe that the Disciplinary Board of Pennsylvania really made the Bar look foolish. It never should have instituted the proceeding for reciprocal discipline after the Admissions Board had certified the Respondent's character. Unlike the Court, I believe that consideration of the issue of character for purposes of admission precludes reconsideration of the exact same events by a different arm of the Bar. I agree with the Court that reciprocal discipline based on the facts surrounding the case, in any event would work a grave injustice, and that therefore reciprocal discipline should not be imposed. But as stated, I would not have even gotten to the issue of reconsidering those facts, since the Admission Board had certified him.

The most important aspect of this case was pointed out by the Concurring opinions and involves the amendment of the rule that was designed to make sure such embarrassing situations do not occur in the future. The rule change in my belief is total crap. It is also total Bullshit that neither New Jersey or Ohio offer substantial opportunity for reinstatement upon Disbarrment. People do change, and can be rehabilitated with the notable exception perhaps of those who have committed extremely violent or dishonest crimes. Minor criminal convictions should not preclude a person from practicing law for the rest of their life. The Judiciary, Courts and State Bars of this nation, generally speaking, have simply made too many mistakes of their own in too many cases, to adopt that hypocritical, "holier than thou," attitude. They are in no position to preclude forgiveness of others, since presumably they want the general public to be somewhat understanding about the countless screw-ups they have made as a branch of government. For the same reason that I believe New Jersey and Ohio should provide for reinstatement of rehabilitated Disbarred attorneys, I believe that Pennsylvania (and all Bars in fact) should allow for an admission process that does not automatically preclude admission of individuals Disbarred in other states. Upon proper showing of remorse and rehabilitation, such individuals should be allowed to re-enter the practice of law.

In summary, my holding would be that once character is certified by the Admission Board, the same events may not be re-examined for the purpose of immediately instituting Discipline after admission. I would further hold that Disbarrment in one jurisdiction does not preclude admission in another, although the Disbarrment itself and the facts surrounding it should most certainly be disclosed, examined by and considered by the new State in which admission is being sought. The result of my holding would be to avoid any repeat of the embarrassing situation this case caused, and also to avoid grave injustice for those individuals who have been Disbarred for minor or Unjust reasons, or were justifiably Disbarred but who are not rehabilitated.

Naturally, as always, I'm right and those who disagree with me are wrong. It must be my judicial nature.

RHODE ISLAND

1972.RI.4804 JUNE 21, 1972

THE SECOND LSAT

The Applicant was 26 years old. He was a graduate of Brown University and Boston College Law School. At the time he filed his application, he was employed by Rhode Island Legal Services, Inc.. The Board discovered that in 1967 he took the Law School Aptitude Test (LSAT) twice. Once in February and again in April. In September, 1970, he appeared before the Board and was asked if he personally took the test each time. He answered in the affirmative. The Board then revealed that it had information purportedly showing that a Brown classmate of his had taken the second LSAT using his name. On October 30, 1970, the Applicant authorized the testing service to release the test papers to the board and he again declared that he personally took the second LSAT. Now, the case gets really muddy. In March, 1972 a Hearing is held.

Try to follow this story closely, because it's a bit complicated. The Board presented as a witness, the person who allegedly sat for the LSAT in place of the Applicant. That person testified that around the time of the second LSAT, a third classmate was charged with marijuana possession.

The Applicant was allegedly going to testify against that classmate as a prosecution witness. The classmate charged with marijuana possession was represented by an attorney.

Now get this! The person who purportedly sat for the second LSAT in place of the Applicant, met with the attorney representing the classmate charged with marijuana possession. He informed that attorney about sitting for the second LSAT, for the purpose of discrediting the Applicant's testimony in the criminal prosecution.

And now the CLINCHER! The attorney who represented the classmate charged with marijuana possession, later became a member of the Board of Bar Examiners. He was apparently the person who brought these matters to the attention of the Board, and then to make it look a little better, he disqualified himself from considering the character aspect of the application. After of course, he succeeded in discrediting the Applicant.

One last beauty! The Applicant consulted with an attorney to assist him regarding the second LSAT issue. After their consultation, that attorney also became a member of the Board of Bar Examiners. The Applicant contended that he had been "ambushed." He asserted that he was not accorded procedural due process because the Board had not notified him that this issue would be raised against him, even though they had knowledge of it. The Supreme Court rules against him. In reference to the contention that he was ambushed, the Court states:

> **"<Applicant's> claim that he was "ambushed" by the board** fades in the light of the record. At the mid-September, 1970 meeting, it informed <Applicant> as to the nature of its information . . . ."

The Supreme Court is at best "misleading" and "lacking candor" in the manner it dispels the ambush contention. While it is true the Applicant was given information in September, 1970, <u>that was only after the Board had succeeded with their ambush.</u> The opinion states in reference to the September, 1970 meeting:

> "The petitioner was asked if he personally had taken the test each time it had been given. <Applicant> gave an affirmative reply. **The board then revealed** that it had information which purported to show that a Brown classmate . . . had taken the second L.S.A.T. . . ." [359]

The Board didn't reveal the relevant information to the Applicant, until they got him to answer the question they wanted him to answer. Stated simply, he was questioned on the LSAT issue without having been given notice, that it would be raised. After he answered questions related to the taking of the LSAT, THEN they gave him the relevant information.

He was ambushed. No doubt about it. The Court's claim that the ambush allegation "fades in the light of the record" is at best "misleading" and at most, a blatant lie, since their opinion supports rather than dispels the contention. Rather, it is the Bar's credibility that "fades in light of the record."

This case is another example of where pretty much everybody carries fault. There does seem to be evidence that the Applicant had somebody else sit for the LSAT on his behalf. By the same token, the Bar engaged in highly unethical tactics to gather the evidence. They then used that evidence in a manner that clearly violated the Applicant's due process rights. The Court perpetuated the scam by whitewashing the Bar's unethical conduct, and mischaracterizing the sequence of events.

I would admit the Applicant. My reasoning is predicated solely on the Bar's wrongful conduct. The Bar's conduct should preclude consideration of the LSAT issue, similar in manner to how Miranda violations result in evidence unconstitutionally obtained being excluded in Court. The LSAT evidence was unethically obtained. The ethical standards should apply as vigorously to admissions committees as Applicants.

I would also note facetiously that even if the Applicant lied and had someone sit for the second LSAT on his behalf, as appears to be what occurred, that fact coupled with the Bar's ambush tactics, and the Court's whitewash of the Bar's conduct, would seem to indicate that he'd fit right in with the Rhode Island Bar.

The Applicant was a member of the California Bar and the Massachusetts Bar. He was not yet a member of the Rhode Island Bar, but was nevertheless engaged to work as chief prosecutor for the Rhode Island Ethics Commission. On October 20, 1993 he was informed by the Chief Disciplinary Counsel that his activities for the Commission probably involved the practice of law.

Whether he admitted that he was engaging in the practice of law, or whether he denied that his activities constituted the practice of law during that meeting became an issue of contention. In any event, two days later, he filed an application for admission to the Bar. The Executive Director of the Commission expressed her opinion that the Applicant's activities did not constitute the practice of law. She then applied to the Acting Chief Justice of the Court for an Order granting him admission to the Rhode Island Bar, pending formal admission, so that he could carry out duties pending before the Commission. Essentially, she was looking for a special favor. The Court rules on the request as follows:

> "Our rules . . . make no such provision for admission to the bar on a limited basis unless the applicant is an employee of a federally funded agency. Instead, an order was issued allowing petitioner, **pending his formal admission to the bar, to represent the commission in all matters before that body and allowing him to appear in Superior Court . . . pro hac vice** in respect to all matters arising out of the business of the commission."

The Order was entered on November 2, 1993. I believe the Court looks foolish by issuing such an Order. To the extent the Order provides for appearance on a "pro hac vice" basis, it is well known that rules providing for such practice by out of state attorneys are designed to allow for appearance on individual, particular cases, not "all matters before that body." The result of this Order was that in addition to allowing the Applicant to engage in UPL if indeed his activities were the practice of law, the Court circumvented the standard intent of pro hac vice appearances.

On May 3, 1994, the Committee recommended that his application for admission be delayed for four months and that his authorization to appear pro hac vice be revoked. The Applicant contended that his activities did not constitute the practice of law. He asserted they involved preliminary investigative activities. The issues in this case made everyone look pretty foolish. The "Egg" on the faces of both the Supreme Court of Rhode Island and the Chief Disciplinary Counsel was evident from the following passages in the Court's opinion:

> ". . . We agree with the committee's finding that **the testimony of Chief Disciplinary Counsel on the one hand and petitioner on the other hand is not easy to reconcile.** . . . The petitioner in his testimony stated that Chief Disciplinary Counsel was absolutely incorrect in that statement and that **her recollection was "incorrect or incorrectly mis-remembered<sic>."**

The Court then addresses the UPL aspect more directly:

> **"In view of the now substantially conceded fact that petitioner maintained a good-faith belief that he was not engaged in the practice of law, we are of the opinion that he was unlikely to have agreed in his interview with Chief Disciplinary Counsel that he had been doing so. Chief Disciplinary Counsel's testimony on this subject is largely conclusory in effect as opposed to quoting specific statements by petitioner. We believe that Chief Disciplinary Counsel's sincere opinion that petitioner had been wrongfully engaged in the practice of law in his capacity as chief prosecutor for the commission may well have caused her to conclude that petitioner did not dispute her opinion. . . ."**

And then my favorite part:

> "We commend the committee for its careful consideration of petitioner's application and for its close attention to the possibility of petitioner's engaging in activities that might well be considered by an impartial person such as Chief Disciplinary Counsel to constitute the practice of law. . . .
>
> The committee has taken the very understandable position that the commission and its chief prosecution attorney (now its executive director) must be subject to the statutes of this state concerning unauthorized practice of law and also subject to the rules of this court. . . .This was a close case and the committee has certainly exercised its best conscientious judgment in its findings and recommendations to this court." [360]

After reading the case, one has a grand feeling that UPL rules coupled with the admissions process are utilized for the purpose of accomplishing political goals. It is clear there was friction between the Applicant who was a Chief Prosecutor for the Commission (subsequently its executive director), and the Chief Disciplinary Counsel. The Supreme Court for the most part bumbled the ball trying not to offend anyone. It simply wanted one big, happy, State Bar family. Ultimately, the Court was left with having to gently and nimbly decide that the Chief Disciplinary Counsel was lacking candor when she falsely contended that the Applicant agreed his activities constituted the practice of law at the first meeting. The Court however rather than stating such outright, commended the committee for diligently addressing the issues, to soften the impact of their decision.

Should the Applicant have been admitted? That question unlike in other cases in this book, was not even the issue in this case. Rather instead, the issue was how the Bar admissions process could effectively be manipulated by the Bar and Court to accomplish political goals.

Supreme Court of Rhode Island, No. 93-246-M.P. ; Versuslaw 1996.RI.84

The ACLU contended that Questions 26, 29(a) and 29(b) of the Rhode Island Bar application violated the American With Disabilities Act (ADA). They asserted the questions violated an Applicant's right to privacy. Question 26 inquired into an Applicant's status as an alcohol or drug dependent person during the last five years. The ADA affords protection to dependent persons who are not **"currently"** using drugs or alcohol. The five year "look-back" period was the issue. Similarly, the ACLU asserted that Question 29 by making inquiry into whether an individual had ever been admitted to a medical or mental health facility for treatment of an "emotional disturbance, nervous or mental disorder" violated the ADA. The Court ultimately changes the phrasing of Question 26 to read "currently" rather than in the last five years. Additionally, it defined the word "currently" as follows:

> "Currently" means recently enough so that the condition could reasonably be expected to have an impact on your ability to function as a lawyer."

The Court's definition of "currently" is incorrect. It irrationally extends the applicable period beyond the common and ordinary usage of the term "current." "Currently" means "now," not "recently enough." It means at the exact precise moment when the application is filed. Where the Court's opinion leaves an Applicant is uncertain. Conceivably, the Court left the door open for the Bar to expand the definition of the phrase "recently enough" to mean extending back five years, which would place an Applicant in the exact same position before their opinion. It set the foundation for another instance of defining words in a circular fashion to negate the impact of their revision.

The Court also makes one particularly interesting comment that could set the foundation for significant litigation in other areas of the admissions process. The opinion states:

> "We are persuaded that the **procedures required for admittance to the bar are the functional equivalent of a hiring process** and that **the committee operates as the equivalent of an employer** when it screens applicants." [361]

Such being the case, the legitimacy of asking questions pertaining to payment of debts, civil suits, etc., may be significantly diminished. Other types of employers typically do not ask such questions. If the Bar is the equivalent of an employer, then why should they be entitled to make inquiries, when employers in other fields decline to do so? Also, if the Bar is the equivalent of an employer, then is their focal interest the success of their "business," or furthering the public interest? The answer is obvious.

SUPREME COURT OF RHODE ISLAND, No. 2000-276-M.P. (11/20/2000); Versuslaw 2000.RI.0042188 (2000)

The Applicant was convicted in 1985 of shoplifting and failed to abide by the terms of his probation. A year later, he was convicted of the felony of resisting arrest with violence. A Florida sentencing Judge sentenced him to 51 weeks in prison after he again violated his initial three-year probation sentence. He then attended Community College.

After exhibiting a homemade air-gun in a class, his dormitory room was searched and authorities found an automatic pistol, an automatic rifle with 500 rounds of ammunition, and an AK-47 assault rifle. He was charged with being a felon in possession of firearms, and possession of an unregistered firearm. He pled guilty to the registration count and was sentenced to twenty months in federal prison. The sentence terminated in 1993. He also had a conviction for providing a false statement to authorities in Florida.

The State Bar in a 4-2 decision, recommends that he be admitted. In my opinion, they look like buffoons for doing so. I would not have even faintly considered admitting this man to the Bar. He has extremely serious criminal convictions that deal with violence and at least four convictions in total. How they could recommend his admission, while declining to certify other applicants for the multitude of piddly reasons delineated herein, is completely beyond my comprehension.

The State Supreme Court admirably writes an extremely good opinion reversing the decision of the Bar and denies admission. The State Supreme Court is to be commended. Every now and then I say nice things about State Supreme Courts.[362]

SOUTH CAROLINA

Opinion No. 24660
1997.SC.185 (Versuslaw) (1997)

This is an attorney disciplinary proceeding involving the issue of nondisclosure of matters on the Bar application. The attorney conceded that he didn't disclose some matters. He did not contest that the nondisclosures were "knowing." Rather instead, he contended that the omitted information was not "material."

I have previously addressed the element of materiality in depth. I have further asserted that it is my opinion, lawful conduct related to participation in civil litigation is not a rational ground for denial of admission to the Bar. The ability to engage in litigation is a constitutional right. To the extent civil litigation encompasses criminal conduct, it presumably should result in prosecution, and if a conviction results, the Applicant would be required to disclose such. The South Carolina Supreme Court irrationally disagrees. They state:

> "Although the fact of a lawsuit or judgment does not indicate an applicant's lack of fitness, the Committee on Character and Fitness **should know of the judgment so that it may determine such issues as whether the underlying lawsuit involved any fraud or dishonesty** by the bar applicant. Unless it knows of lawsuits and judgments, it cannot makes these determinations. Consequently, misrepresentation regarding the existence or status of a lawsuit or a judgment is material." [363]

The problem with the Court's reasoning is that it is inconsistent with their failure to require disclosure of such information on a periodic basis by licensed attorneys. If we assume arguendo, that their reasoning is correct, then presumably the Bar should be informed about every lawsuit involving its' members. Why require only the Applicant, rather than the licensed attorney to disclose? The Court imprudently plays both sides of the field. The disparity in application of their purported principal of ethics, between attorneys and Applicants exposes their hand. From a perspective of materiality, the Court's language requiring disclosure of lawsuits so the Committee "may determine such issues as whether the underlying lawsuit involved any fraud or dishonesty" is an adaptation of the "inhibiting the efforts" definition of materiality. As previously discussed, that concept has the result of wholly negating the element of materiality. The point is summarized as follows:

> **"If material nondisclosures are defined as failing to disclose that which "inhibits the efforts" of the committee's review, and "inhibiting the efforts" is defined as occurring when information is not disclosed, then every single nondisclosure is material in nature. Nondisclosure then is material, without regard to the relevance or nature of the omitted information."**

To reach a conclusion that one lies or lacks candor when they fail to disclose, four elements must be established which are:

1. Knowledge
2. Materiality
3. Intent to deceive
4. Express inquiry into subject matter

Ultimately, what you are left with from the South Carolina Supreme Court's reasoning is that nondisclosure encompasses only two elements. A knowing nondisclosure with intent to deceive would constitute lying under their standard. Perhaps you, the reader are thinking that is a good definition. Perhaps you believe an Applicant lies when they fail to disclose any matter with an intent to deceive. My response then, is how do you apply that definition to admission questions such as:

"Describe any incident in your life that reflects negatively upon your character?"

If an Applicant can specifically remember throwing food in a restaurant when eight years old, being sent to the principal's office at age eleven, and "knowingly" fails to disclose those matters, with an intent to deceive, should they be denied admission? Most people, I believe would say such matters should not affect admission. The reason is that most people would agree they are immaterial. What about the small "lies" everyone tells each day in life? If a person asks you how they look, and you know they look like crap but you "knowingly" with an "intent to deceive," tell them, they look "fine," should you be denied admission to the Bar? Obviously, it's not a "material" matter impacting upon your ability to practice law. Materiality has to be a key element for the process to be fair.

The Court's incorrect definition of materiality, eliminates the concept of materiality in its entirety. Materiality is properly defined as that which affects the final decision if disclosed, rather than that which purportedly "inhibits the efforts" of the assessment. Utilization of the "inhibiting the efforts" notion places materiality squarely into the realm of being one of the arbitrary and dangerous tools to assess character, which the U.S. Supreme Court warned about in ***Konigsberg***.

SOUTH DAKOTA

254 N.W.2d 452 (1977)

THE HYPOCRITICAL JUDICIAL PSYCHIATRIST

A disciplinary action was instituted by the Bar against a licensed attorney that included matters related to the fact he pled no contest to a charge of willful failure to file income tax returns. The Supreme Court of South Dakota addressed this aspect as follows:

> "This court has previously held that the **violation of the federal statute for failure to file federal income tax returns is not a misdemeanor necessarily involving moral turpitude** within the purview of the disbarment statute **and does not necessitate disbarment**."

How does their irrational holding square with State Bar admission policies regarding disclosure? In my opinion, a conviction for failure to file income tax returns is more egregious and indicative of poor moral character than a failure to disclose civil suits, debts and the like on a Bar application. If the individual in this case applied to a Bar, in the absence of a sufficient lapse of time and evidence of rehabilitation, I would be inclined to deny admission. The South Dakota Supreme Court however, was not inclined to disbar the attorney for the conviction. The attorney in this case also pled guilty to a charge of driving a motor vehicle while under the influence of intoxicating liquor. The Court addressed this matter as follows:

> **"nor do we find that driving a motor vehicle while under the influence of intoxicating liquor involves moral turpitude within the purview of the statute. . . ."** [364]

I have difficulty accepting such a standard for attorneys, while at the same time denying admission to Applicants for DUI convictions. The licensed attorney is clearly being held to a lower, rather than a higher standard of conduct. While I do not believe a DUI conviction in the absence of aggravating factors is a heinous crime, it certainly resides somewhere between trivial and serious. Perhaps the reader differs with me, though. In any event, however you view a DUI conviction, it can not rationally be rebutted that the same standard should apply for the attorney and the Applicant. If anything, the attorney should be held to a higher standard, instead of the reverse as is obviously the case.

The attorney in this case cited the Oregon case of 244 Or. 282 (1966) to thwart disbarment. In that case, the Supreme Court of Oregon in a disciplinary proceeding imposed a most unusual sanction. It suspended the attorney from the practice of law, BUT then held the sanction and suspension would be imposed only if the attorney failed to refrain from using alcoholic beverages, and failed to discontinue the neglectful manner characterizing his professional conduct.

The South Dakota Supreme Court in this case, ultimately adopts a similar posture. I object to such an irrational determination by both Courts. On the one hand, the Supreme Courts impose an unreasonably stringent standard on the Bar Applicant with respect to moral character, but on the other, they grant immense leeway to the licensed attorney. The licensed attorney can have criminal convictions, fail to perform duties as an attorney, and even then they are not suspended. Instead, they are given a second chance. I do not suggest necessarily making the standard unreasonably stringent for the attorneys. Quite the contrary. I suggest subjecting the Applicant to the same lenient standard as the licensed attorney.

Of equal importance, I can't stand a wishy-washy State Supreme Court. Take a stand. Either discipline the attorney or don't discipline him. The concept of asserting that the attorney is disciplined,

but that the penalty will not be imposed so long as he stops drinking alcohol smacks of governmentally imposed behavior modification. The attorney's duty is limited to not breaking the law, and complying with the ethical rules of conduct. The disciplinary process is no place for the Court to gain control of one's lifestyle by suspending punishment, predicated on controlling a person's Out-of-Court lawful conduct.

If the attorney wants to drink booze, he should be able to. If he gets convicted of a DUI, then discipline him or don't discipline him. But don't play the role of a judicial social worker, because the Courts and Judges simply have too many of their own psychological deficiencies and emotional insecurities to rationally justify that role.

539 N.W.2d 671 (1995)

THE INSECURE LAW PROFESSOR

The Applicant was denied admission on character grounds. During his first year in law school he was President of his class. In his second year, 1992, he wrote and submitted a case-note for law review publication. He allegedly included material in the article without proper citation. When confronted by a faculty advisor he denied any dishonest intention. No formal disciplinary action was taken, but he was admonished in a strongly worded letter. He also received a failing grade in the course.

During his final semester, in another class, the final exam consisted of ten questions handed out during the first weeks of the semester. The students were given the entire semester to work on completing the exam. They were instructed not to consult with each another. The Professor discovered that two students had similar answers. Ultimately she assigned a failing grade to both, and they received no credit for the course. Based on these events, the Applicant did not have enough credits to graduate. He filed a grievance against the Professor. In the meantime, he attended summer school and received the necessary credits to graduate. He passed the Bar exam, but was not admitted based upon the foregoing incident.

The primary fault in this case, rests with the law Professor. The reason is as follows. The Professor was a complete NITWIT!! The concept of distributing an open book exam during the first few weeks of a class, coupled with a restriction that students cannot discuss the questions with each other, is fundamentally ludicrous. The Professor was intentionally setting the students up for a situation like this.

Presumably, the questions addressed material that would be covered during the class throughout the semester. Were the students supposed to not discuss subjects covered in class? If they did discuss a class lecture, wouldn't they be violating the prohibition? How do you draw the line between what constitutes openly discussing class lectures, and the subject matter of the exam questions?

Or did the exam not cover the class material? That would obviously be an unfair exam. If the exam presumably did cover the class material, then wouldn't one expect that answers by law students who knew their subject would be somewhat similar? Obviously, yes. It makes no logical sense to expect a large group of students to be completely silent with each other on class material for an entire semester.

Logic further dictates that the Professor knew this. The circumstances surrounding her preposterous policy, strongly suggest that she wanted a situation like this to occur. She knew students talk with each other. She set the situation up in the hope that she would be able to bust someone's chops. It's simple as that and the Court should have seen through her lunacy. Law school final exams should be given at the end of a class, not the beginning of a semester. They should be closed book, and wholly objective. In that manner, egotistical Professors don't have the opportunity to exercise political leverage on helpless law students seeking to enter into the profession.

Professors that adopt lame-brained policies as this one, are in all likelihood I believe, lawyers who were never able to successfully accomplish the art of leverage in the legal profession when up against skilled opponents. They seek to vindicate their fragile egos by taking it out on young students. That's crap. You want to take somebody on, then you take on those who are stronger, not weaker than you. Setting up law students for a situation like this is characteristic of nothing more than an insecure, incompetent law school, Professor Punk.

One other note on the facts of this case. The Applicant argued that the Dean of the Law School disclosed both orally and in writing, aspects of the admission Hearing, contrary to the Board's directive not to discuss the matter. He also claimed that the Law School was suppressing evidence and that there were irregularities in the Hearing, including that the Dean was allowed to remain in the Hearing room

following sequestration of other witnesses. That smells bad to me. He further contended that as a result of such irregularities he was entitled to a new Hearing.

The Court whitewashes these matters stating:

> "Before a motion for a new hearing based on new evidence may be granted, **it must be shown that . . . it would have changed the outcome."**

WHOAA!! My little Judicial Doggies!! Did I read that right? What happened to all that crap about "inhibiting the efforts" when it comes to assessing materiality. Read again how Courts define materiality with respect to Applicant nondisclosures in 386 SE2d 174 (1989) on pgs. 457-459. Applicant nondisclosures are assessed based on whether they "inhibited the efforts" of the Bar. But, the **exact same standard that I have been suggesting for materiality** is the standard that the Bars get the benefit of. That standard is:

> "Would the information if disclosed have **affected the outcome?"**

Perhaps, we have a bit of a double standard, guys? Looks pretty smelly. One standard of materiality when the Applicant's interests are at stake, and one when the Bar's economic interests are at stake. The Court also makes the following comment:

> "We recognize the present case involves a question of admission to the bar rather than attorney discipline, however, the same rationale applies here with equal justification." [365]

The Court lacks candor by making the foregoing statement. If the same rationale applies, then why doesn't the Bar make regular inquiries on character issues of licensed attorneys? The answer is obvious. Neither the Court or State Bar really want the same "rationale" to apply. When they write that "the same rationale applies" they are "misleading," and "evasive." After all, if the same rationale applied then every Justice on the State Supreme Court would have to disclose all of the embarrassing information that occurred in their own life for the last several decades. And I bet there's a lot of it.

Versuslaw 2001.SD 29, 2001.SD.0000030; No. 21757 (March 7, 2001)

STATE SUPREME COURTS THAT USE MICROSCOPES MAY FIND THE PUBLIC ALSO STARTS USING MICROSCOPES

The Applicant had two DUI arrests, was fired for failing a drug test indicating marijuana use, and it was alleged that he had physically abused his former girlfriend. The incident involving his former girlfriend does not appear to have resulted in any type of conviction, and based on the facts presented in the opinion, she does not appear to have been a "Princess," so to speak. Quite to the contrary. Apparently, what occurred was that the Applicant confided to his girlfriend that he had previously been romantically involved with another woman who was going through a divorce. The girlfriend then interjected herself into the divorce proceedings. The Applicant told his girlfriend that he wanted to end their relationship. She then followed him, called him, and ultimately pursued him at high speed on an interstate highway.

A divided Board recommended his conditional admission which the Court denied. In 1999, he reapplied for admission and a unanimous Board recommended his conditional admission. A divided State Supreme Court granted conditional admission. I would admit him outright. The concept of conditional admission is Crap. The Court states in reference to the period during which he will be conditionally admitted:

> "There is no doubt that <Applicant's> conduct **will be viewed as if he was under a microscope throughout this conditional period**. After such close diagnostic observation, this Court will again have the opportunity to again consider whether to lift the condition of this admission based on <Applicant's> showing that such lifting is appropriate."

A Concurring opinion then states:

> "A conditional admission shall be confidential . . . ."

A Dissenting opinion then states:

> "The conditional admission is not a public situation. The public does not know you have been conditionally admitted."

I will concentrate on the Dissenting opinion cited above because it particularly annoyed me. And I don't like to be annoyed. It must be my judicial nature. The Dissent in this case would have denied admission entirely to the Applicant on the ground that he lacked good moral character. Yet, the same Dissent cited above has substantively pointed out that the State Supreme Court is concealing from the general public the aspect of conditional admission. The Court is deceptively allowing the public to believe the Applicant in this case is a full-fledged attorney, when in fact his conduct (unlike other South Dakota attorneys) will be viewed as if he were "under a microscope." To put the matter simply, the Dissent presents all of these "holier than thou" character reasons for denying admission to this Applicant based upon essentially trivial matters, but doesn't seem to have a problem with the entire immoral concept of conditional admission. The Dissent should clearly be concerned more about the immoral nature of the Court, including himself, than the Applicant in this case. The same Dissent also states as follows:

> ""The right to practice law" is not in any proper sense of the word a "right" at all, but rather a matter of license and high privilege." [366]

By making the above statement, the Dissent is once again engaging in false and misleading disclosure, which obviously calls into question the moral character of the Dissenting Justice and his ability to engage in the practice of law without harming the public interest. The "right" to practice law is precisely that. A "RIGHT." That is what the U.S. Supreme Court said in Ex Parte Garland, and has repeated in numerous subsequent cases including New Hampshire v Piper, and Baird v Arizona State Bar. Ultiimately, the unavoidable conclusion that must be reached in this case is that the Dissent is failing to demonstrate the proper degree of respect for the rule of law by falsely characterizing the nature of the right to practice law and usurping the authority of the U.S. Supreme Court in doing so. This obviously reflects adversely upon the Dissent's moral character.

Finally, I note that as a litigant, I definitely would not want to be represented by the Applicant in this case. He's not a full attorney. He is only conditionally admitted, and unlike any South Dakota counsel representing an opposing litigant, his conduct is under a microscope. That harms any litigant represented by this "quasi-lawyer." I would prefer to be represented by an attorney whose conduct is not under a microscope, because such scrutiny gives opposing counsel too much leverage to use against the Quasi-Attorney in this case. The ultimate victim will be the litigants he represents. The State Supreme Court substantively forgets them, providing only lip-service their interest.

The concept of conditional admission is crap. Both the Majority and the Dissent lacked good moral character in this case, as well as the Bar Board. The Majority lacked good moral character for limiting admission to a conditional status and then deceptively concealing such a critical fact from the general public. The Dissent lacked good moral character for falsely characterizing the nature of the ability to practice law, and falsely alleging the Applicant in this case was not morally fit to practice law. He definitely should have been admitted outright. I would suspend the Justices of the State Supreme Court and members of the Board, but allow them to apply for reinstatement in no less than three years upon a showing of remorse and rehabilitation.

TENNESSEE

770 S.W.2d 755 (1988)

THE TENNESSEE TANEYs

The Plaintiffs in this case were Bar Applicants who sat for the 1985 and 1986 Bar exams. They failed the essay portion of the exam and instituted suit contending the Board did not maintain objective standards for determination of a failing or passing grade. They further contended that as a result, the exam amounted to a fulfillment of quotas. The Plaintiffs additionally contended that after they petitioned the Tennessee Supreme Court for review, the Board of Law Examiners failed to accord them anonymity as required by Supreme Court rules, when they took a subsequent Bar exam.

They also contended that the Board retaliated against them for filing a Supreme Court petition, intentionally discriminated against them and maliciously denied them passing grades. I like their case. But there's more. They further contended that Memphis State University and the individual defendants connected therewith, conspired with the Board of Law Examiners in determining who would be allowed to fill the quota of passing Applicants and that the law school recommended the Board should not pass particular Plaintiffs on the exam. They also alleged that a particular law professor, while acting ostensibly as their friend and confidant, was in fact betraying their confidence to the Board of Law Examiners and advising the Board against the best interest of plaintiffs.

The Court writes a lengthy opinion ruling against them, which in my belief is wholly illegitimated by the following statement in their opinion:

> "The power to determine who should practice before the courts has been aptly summarized by **Chief Justice Taney:**
>
> > "And it has been well settled . . . that it rests exclusively with the court. . . ." [367]

Why does such a simple statement illegitimate the opinion? Very simple. Anyone who knows anything about the law knows that it is generally inadvisable to quote Chief Justice Taney. No United States Supreme Court Justice has been more scorned. He wrote the opinion, which contributed significantly to, and in fact was arguably the primary cause of the outbreak of this nation's Civil War.

Taney wrote the opinion in the infamous Dred Scott case, which condoned slavery. Any State Supreme Court Justice that quotes Taney with approval in any case, of any nature, is essentially begging to be branded a racist. As to the merits of the Applicant's case, it is irrefutable that grading an essay exam is subjective in nature. The grader can assess the examinee's beliefs and opinions, which can not help but to inextricably be intertwined with their answer to a question. The Bar exam must be fully objective without exception. Otherwise, it invites discrimination and prejudice.

TEXAS

In considering the Texas cases, it is important to point out that Texas administers the admissions process in a unique manner. An Applicant appealing denial of admission to the Bar based on the moral character assessment, appeals to a trial court, rather than the State Supreme Court. The matter is then appealable to the State Court of Appeals, then the State Supreme Court, and then the U.S. Supreme Court. This system allows Texas to essentially keep the matter "in-house" for a more lengthy period of time in comparison with other states where denial is appealed directly to the State Supreme Court and then the U.S. Supreme Court. Texas has realistically imposed upon the Applicant for the benefit of the Bar, two additional procedural levels that are absent in other States.

On the brighter side, their unique system increases the likelihood that the various State levels of character assessment will contradict each other, thereby making the State's legal profession look foolish. The various intra-branch political grabs for power become rather amusing.

No. 3-90-097-CV 7/24/90 1990.TX.1127
COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

THE HIGGLEDY-PIGGLEDY BOARD OF LAW EXAMINERS

The Board of Law Examiners denied admission to the Applicant on character grounds. The Applicant appealed to the District Court of Travis County which ruled in his favor, concluding that the Board's determination was not supported by substantial evidence. The Board then appealed to the Court of Appeals. The Court of Appeals opinion states as follows:

> "An orderly examination is made difficult by the fact that the Board's record appears **higgledy-piggledy** in the transcript rather than as an exhibit in the statement of facts.
>
> There is no formal Board order in the administrative record; . . ."

The character issue focused on the Applicant's response to Question 6(b) of his filed "Declaration of Intention to Study Law" (not required by most States), which related to his employment during the last ten years. Also, Question 11(b) became an issue of dispute, related to an Applicant's examination or treatment for mental, emotional or nervous disorders. The Board concluded that the Applicant failed to cooperate, lacked candor, and exhibited a continuing attitude of immaturity and lack of respect for authority.

In response to the employment inquiry, the Applicant responded that he was employed by the national accounting firm of Peat, Marwick, Mitchel and Co. (now KPMG) as an Assistant Tax Specialist. In explaining the reason for his termination, he stated:

> **"Why don't you ask them & let me know because I have been wondering now for 3 ½ years."**

He responded as follows to the question about treatment for mental, emotional or nervous disorders:

> "Yes, I saw a counselor as a youth (17-18 yrs. old). **This stuff is really none of your business** as it does not affect my ability to practice law in Texas."

The Board claimed that he did not fully respond to the "reason for termination" portion of the employment inquiry. Testimony at the Bar Hearing pertaining to the employment termination issue included the following:

"Q. . . . what was the reason for your termination from Peat, Marwick?

A. I don't know. All they told me was that I was not cut out for public accounting. That is the only reason they gave me, and I have been wondering the same. . . . I was legitimately asking you that.

Q. Did you know that was the reason for your termination at the time you filed your Declaration?

A. That I had been told that?

Q. Yes, sir.

A. Yes.

The foregoing exchange portrays the Board's position as rather lame. Essentially, the interrogator was trying to assert that by being told he was simply "not cut out for public accounting," the Applicant should have disclosed such as the reason for his termination. Proper interpretation of the above exchange confirms fairly well that the Applicant did not know the reason for his termination. He stated in no uncertain terms:

"That is the only reason they gave me, and I have been wondering the same"

The Court of Appeals opinion states:

". . . In its brief, in fact, the Board claims that his failure to put down these words in the application is proof certain of a character fault.

At best, the meaning of the phrase "not cut out for public accounting" is obscure. What meaning the accounting firm assigned to the phrase is, of course, known only to the firm. Does the expression relate to work habits or proficiency, or to job performance or attitude?"

The Applicant disclosed two arrests in 1987 and 1988. One for disorderly conduct and evading arrest, and the other for "failure to identify." He did not however, provide the court records with his application. The disorderly conduct arrest stemmed from noise at a law school party he attended. The Dallas police forced their way into the apartment where the party was being held and seized the hostess. The Applicant and other law students proceeded to lecture the police about the law and were consequently arrested themselves. The Applicant was found "Not Guilty." The second arrest in 1988 involved a prank at a fast-food drive-in and was dismissed.

Now, get this part of the Court's opinion on the Board of Law Examiners obvious twisted lunacy:

". . . the Board claims that it was empowered to deny his application, **not for the content of his answers, but instead "for the way he answered questions** . . . ." The Board characterizes

<Applicant's> answers as "curt dismissals" and his failure to supply the court records as "flagrant non-compliance with the requirements to furnish records."

This is clearly a Board of Law Examiners begging for a bit of an attitude adjustment. The Court handles the matter quite well and I applaud their statement:

"This Court is troubled by the Board's basic premise that it has the power to deny an applicant the opportunity to sit for examination **based simply upon the manner in which he answers** the application and without reference to the content of the answers. We know of no such authority and the Board has directed our attention to none. . . .

. . . Aside from the problem of the Board's authority, **the Board's characterization** that <Applicant> was in "flagrant non-compliance with the requirement to furnish records" **is erroneous.** <Applicant> reasonably explained his inability to sent the court records at the same time that he filed his application. . . ."

The Board irrationally asserted that the Applicant's answer to the inquiry about counseling was perhaps the "best evidence," that he lacked the requisite character. The Court writes in reference to such:

"Finally, the Board contends that <Applicant's> answer to question 11 is "perhaps the best evidence that <Applicant> lacked the required character to practice law in Texas. In response to question 11, <Applicant> responded that he was counseled by a psychological examiner when he was seventeen. **His need for counseling stemmed from a tragic accident that claimed the life of his younger brother. Unfortunately, <Applicant> took it upon himself to comment upon the propriety of the Board's inquiry : ". . . . This stuff is really none of your business . . . .**

<Applicant's> answer did furnish the Board with the name and address of the psychological examiner. . . . Far from failing to disclose or cooperate, <Applicant" "over disclosed" **concerning a private matter not related to legitimate inquiry by the Board**. . . ."

Footnote 4 of the opinion contains an important fact. The Applicant provided the following information about his arrest:

"I was charged with disorderly conduct and evading arrest in Dallas County in the spring of 1987. The evading arrest complaint was quashed on its face with no further action. The disorderly conduct <sic> went to a full jury trial on the merits and resulted in a not guilty verdict. The Dallas police arrested me along with two other law students & a MBA student when we objected to the police officers' sexual and physical abuse of a young lady. . . . In August 1988, I was charged with failure to identify . . . .As a matter convenience <sic>, I agreed to a deferred adjudication . . . **on the recommendation and assurances from the judge and prosecutor that I would not have to report, disclose or otherwise discuss this on my bar application.** Obviously they were wrong, and this would be grounds for reversing my . . . agreement to take deferred adjudication. I represented myself, pro se. . . . **I should not have to waive my constitutional rights in order to practice law in Texas."** [368]

This case reflects atrociously on the Board of Law Examiners. The Applicant not only should have won the case as he did, but the Board should have been sanctioned, and perhaps suspended from the practice of law. They lacked candor in the manner they ruthlessly and unjustly attacked this

Applicant. Their "higgledy-piggledy" record that did not even contain a formal Order was "evasive" and "misleading."

Applying their own standards, the Board members would not have had a chance in the world to be admitted to their own Bar. The Board's contention that the application was faulty not because of its' content, but for the "manner" in which the Applicant answered questions was crap.

No. 3-92-005-CV 1992.TX.2207 December 23, 1992
COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN
No. D-3694 SUPREME COURT OF TEXAS 1/5/94

THE HAPHAZARD TEXAS BOARD OF LAW EXAMINERS

My analysis of this case encompasses two court opinions. The Court of Appeals and the Texas Supreme Court.

THE TEXAS COURT OF APPEALS OPINION

The Applicant was a member of the Mississippi State Bar for approximately 20 years. His application to the Texas Bar disclosed two civil judgments entered against him for debts. Supplemental investigations revealed a third unsatisfied judgment and a failure to pay income taxes. The Board of Law Examiners denied admission on character grounds. The Applicant appealed to the Travis County District Court which concluded that the Board's decision was not supported by substantial evidence and reversed. The Board appealed. The Court of Appeals rules in favor of the Applicant stating:

> "The legislative directive to the Board to certify the "good moral character" of each attorney admitted to practice law in this state is **troublingly indefinite.** The Rule adds little precision. . . .
>
> **The United States Supreme Court has warned that "good moral character" is a "vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957).** In a recent decision, this Court determined that the **Board of Law Examiners had "mistaken a spirited bumptiousness for a lack of good moral character.**". . . 793 S.W.2d 753, 760. . . . Critics of using "good moral character" as a measure of the suitability of prospective attorneys note that such a **vague qualification opens the door to arbitrary and subjective judgments** with no demonstrable relationship to the protection of future clients or the administration of justice. See Stephen K. Huber, Admission to the Practice of Law in Texas: A Critique of Standards and Procedures, 17 Hous. L. Rev. 687, 727-28 (1980)."

The Court of Appeals is faced with another sloppy record of the proceedings. The opinion states:

> "Our efforts at review are hindered because **the record appears haphazardly** in the transcript rather than as a discrete exhibit in the statement of facts.
>
> We find **no formal Board order** in the administrative record.

> . . .
> Because "good moral character" is such an **ambiguous qualification** for a prospective attorney, the search for substantial evidence that <Applicant> lacks good moral character is tricky. . . .
>
> . . . To deny admission because of a deficiency in the applicant's character, the Board must find "a clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice . . . ."

The Board had denied admission on grounds including:

> "<Applicant> has demonstrated a marked disrespect for the law as shown by . . . his failure to arrange for satisfaction of three (3) outstanding civil judgments based upon **non-payment of various debts;**
>
> . . . a long-standing lack of financial responsibility in his dealings with creditors . . . ."

The Court of Appeals addresses the Board's contention as follows:

> ". . . we do not find record evidence to support the conclusion that <Applicant's> omissions or his motives are likely to injure future clients. There is no evidence before the trial court indicating that in twenty years as an attorney <Applicant> has ever been the subject of any grievances, complaints or disciplinary hearings in Mississippi. Nor is there evidence that could rationally connect <Applicant's> failure to file tax returns with the obstruction of justice. . . .
> . . .
> **Not all illegal conduct reflects adversely on fitness to practice law; the Disciplinary Rules carry forward the former distinction between "serious crimes" and other offenses**. . . .
> "Serious crime" is defined as "any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent misappropriate of money. . . **.Standing alone, <Applicant's> failure to file federal income tax returns would not seem to constitute a serious crime."** [369]

THE TEXAS SUPREME COURT OPINION

The Board of Law Examiners having suffered one humiliating defeat after another at the Court of Appeals, now appeals to the Texas Supreme Court. And they win. The Supreme Court states:

> "It would be a small comfort to the public if the only ethical standard for admission to the Texas Bar were an absence of convictions involving serious crime and crimes of moral turpitude. Rather than mere absence of gross misbehavior, bar admission affirmatively requires "good moral character". . . .
> . . .
> Although it may initially seem appealing, as the court of appeals suggested, to generate detailed lists of actions that will result in discipline for an attorney or disqualification for a bar applicant, such a list is both impracticable and undesirable.
> . . .
> . . . Likewise, the **diversity of bar applicants renders** advance preparation of an exhaustive list of disqualifying factors problematic."

I believe the real reason that the Court did not want to adopt an objective standard was disclosed in the final sentence above. The reason was the "diversity of bar applicants." It is a prejudicial statement demonstrating exactly what the admissions process is all about. The Court wants to admit only those Applicants possessing the same attitudes, prejudices and beliefs as the State Supreme Court and Bar. The Court concludes as follows:

> "Although <Applicant> presented countervailing evidence of his good character, including evidence of prior public service and letters of recommendation, this evidence does not conclusively negate the evidence that <Applicant> fails to meet the minimum standards under our disciplinary rules."

The political nature of the admissions process is revealed in Footnote 8 of the opinion which states:

> **"<Applicant> served as a member of the Mississippi House of Representatives for four years in the early 1960s**, and also as a military officer in Vietnam. At his hearing, **<Applicant> presented letters of recommendation from a member of the Mississippi Board of Bar Commissioners, the president of the Mississippi State Bar Association, a district judge, former members of the Mississippi legislature, and a former member of the Federal Energy Regulatory Commission."** [369]

Now, my opinion in the case. First, I am wholly unimpressed with the extensive list of individuals disclosed in Footnote 8, from Mississippi that recommended in favor of admission. The admissions decision should be based on a person's qualifications and conduct, rather than who they know.

I am naturally disgusted with the State Supreme Court's attempt to use the "diversity of bar applicants" as justification for subjective assessment, rather than applying fair and objective standards to everyone. The Court of Appeals opinion was much better, with one notable exception. The failure to file federal income tax returns if it results in a conviction is definitely grounds for denying admission. The Court of Appeals apparently was suggesting that even if one is convicted of failure to file federal income tax returns, it is not a crime involving moral turpitude. I view (and believe most law-abiding Americans view) such a failure on the part of a person, as more egregious than puny omissions of civil suits, or answering questions in a "manner" that does not appease the pompous, prejudicial butts of the Texas Board of Law Examiners.

Both this case, and the prior case involved instances where the Board denied admission, the trial court held in favor of the Applicant and the Court of Appeals ruled in favor of the Applicant. The prior case did not go to the State Supreme Court and when this one did, that Court ruled in favor of the Board. It is clear there were many power games taking place, with each side simply using the helpless Applicant, more or less as a pawn. It is also noteworthy that both cases involved instances where the Texas Board, although falsely purporting to assess character in the public interest, maintained the official record in a "higgledy-piggledy" and "haphazard" manner. They didn't issue a formal Order in either case.

This is particularly disturbing regarding the second case, because they were on notice from the Court of Appeals in the first case that failure to issue a formal Order was improper. Even if the Board disagreed with the necessity for a formal Order; in the absence of a Supreme Court opinion indicating otherwise, their perpetuation of such conduct was inexcusable. Applying their own standards, their failure to comply with the Court of Appeals at least until the State Supreme Court indicated otherwise, showed a marked disrespect on their part for the rule of law.

No. 03-95-00061-CV 10/20/95 1995.TX.1428 (Versuslaw)
TEXAS COURT OF APPEALS, THIRD DISTRICT

NOW WE CONTROL YOUR PERSONAL LIFE ALSO

The Board recommended admission, but only wanted to give the Applicant a probationary license. He appealed and the district court ruled in his favor. The Court of Appeals reversed and ruled in favor of the Board. The probationary license required the Applicant to abstain from alcohol and obtain psychiatric care in compliance with the Lawyer's Assistance Program. This is a dream come true for the State Bars. The concept of a probationary license allows them to exercise not only full control over the attorneys' professional life, but also gives them control over the attorney's personal life. It is set up from inception to make the Applicant bitter and resentful. No one wants to be told what they can and can't drink as a condition for licensure as a professional. It is a concept doomed for failure. On the one hand, it makes the State Bars look like mad scientists trying to gain complete and absolute subjective control over an attorney's life. Simultaneously, it makes them appear wishy-washy and indecisive. Take a decisive stand, one way or the other. Admit or don't admit. I would admit the Applicant unconditionally. [370]

No. 03-95-00715-CV 7/31/96 1996.TX.2395 (versuslaw)
TEXAS COURT OF APPEALS, THIRD DISTRICT

VOID THE BOARD, NOT THE EXAM SCORES

In this case, an Applicant who was granted a probationary license appealed the Board's decision to revoke that license based on his purported failure to comply with terms of the license. The Applicant had DWI arrests and at least one DWI conviction. In 1992, he applied for a permanent law license. That application revealed he was arrested for DWI in 1991. He was recommended for a probationary license conditioned on his regular attendance at Alcoholics Anonymous and Lawyers Caring for Lawyers (LCL). LCL while ostensibly an organization to assist lawyers in need, apparently served the dual function of allowing the State Bar to spy on the personal lives of its licensed attorneys.

The "Anonymous" portion of AA is apparently not quite so when it comes to licensed attorneys, since as this case demonstrates, the Applicant's participation was included in the public court opinion. The State Bar obviously frustrates the purpose of fine organizations like AA, which I do believe is probably interested in genuinely assisting those in need. Unlike LCL, I do not believe AA intentionally performs a dual role as a State Bar spy.

The Applicant petitioned for review of the Board's 1992 Order and while the suit was pending he violated the Order. The Board and the Applicant ultimately agreed that he would dismiss his suit in exchange for another probationary license. The Board then moved to revoke that license on the ground the Applicant violated its terms. Their concept of violating terms of the license is delineated in the opinion as follows:

> "The notice also recounted a letter that <Applicant> wrote to the Board informing it that he **would not attend AA meetings during his vacation in St. Thomas."**

There you have it. Once you're forced to go to AA or LCL to maintain your law license, then you have to also cancel your vacation to St. Thomas. Let's have the State Bar explain to the lawyer's kids, why they can't go on vacation, so Mommy or Daddy can maintain their law license. The Board then took the particularly egregious and vindictive step of incorporating within it's Order of revocation, that the Applicant's 1990 Bar exam scores should be voided. They required him to pass another Bar exam before applying for a law license. Obviously, they just wanted to bust his chops. The Court of Appeals admirably demolishes the Texas Board of Law Examiners once again. Their opinion states:

> "In his first point of error, <Applicant> complains that the Board exceeded its statutory authority in making findings of his moral character and fitness at a proceeding limited to the issue of compliance only. We agree.
> . . .
> The Rules Governing Admission . . . detail the procedures for the Board's reconsideration of a candidate's moral character and fitness. . . .**These Rules have the same effect as statutes**. . . .
> . . .
> By its express terms, the authority granted in Rule 16(g) requires that the Board first conduct a hearing to redetermine a candidate's moral character and fitness. . . . Therefore, Rule 16(g) itself cannot be a grant of authority to redetermine a candidate's moral character and fitness. . . .
> . . .
> **. . . the Board exceeded its authority under both the governing statutes and the Rules."** [371]

No. 03-97-00720-CV 1998.TX.42344 November 13, 1998 TEXAS COURT OF APPEALS, THIRD DISTRICT

CATCHING THE BOARD'S CATCH-22

This case is an excellent example of how the Texas Board of Law Examiners perverts the use a probationary license. In the last case, the Board sought to revoke a probationary license because the Applicant did not attend all AA meeting. In this case, the Board not exactly appearing to be a model of consistency, makes the irrational assertion that continued attendance at AA meetings constitutes evidence of chemical dependency. The Board obviously perverts the true intent and most benign purpose of fine organizations such as AA, in order to fulfill their self-interested quest for power over the personal lives of attorneys.

If you ever had a doubt about how diabolical the State Bars are, this quote from the Court's opinion should resolve it. The Court states:

> "Appellant contends that substantial evidence does not exist in the record to support the Board's finding of present chemical dependency. We agree. The Board point to two areas in the administrative record to justify its finding that appellant was presently chemically dependent: (1) that he has been active in AA since 1986 . . . . **We find it hard to imagine how anyone could overcome the stigma of chemical dependency under the Board's concept**. . . . Many experts would view appellant's involvement in AA as evidence that appellant has worked to overcome chemical dependency rather than evidence of a continuing problem. **Furthermore, the Board places appellant in an impossible catch-22 situation: the Board lists involvement in AA as a condition of appellant's probationary license and yet attempts to use appellant's compliance with that condition as evidence of a present chemical dependency. . . ."**

In reference to procedural protections, the Court states :

> **"The Board, however, fails to provide the procedural protections and range of sanctions given regular licensees in the grievance process."**

Consider also this statement by the Court :

> "Appellant's situation under a probationary license **resembles criminal probation** in that the Board has discretion to refuse to recommend appellant for regular licensure and to revoke his probationary license upon a finding that any condition, **no matter how inconsequential**, has been violated."

The foregoing is an interesting concept. By attaining the probationary law license, a person becomes more like a criminal in Texas, compared to a Nonattorney. That license can be revoked if the conditions are violated in a manner "no matter how inconsequential." Is that really fair? Is that the type of protection from dishonest lawyers, the public really needs? Or does it simply give the Board the power to control the lawyer's conduct more closely? Remember, control the lawyer and you control the manner in which he litigates, which ultimately allows the Bar to influence litigation outcomes. Any litigants that lawyer represents then have a decreased likelihood of receiving zealous representation.

Footnote 1 of the opinion, outlines some of the additional terms of the "probationary license" which were numbered as follows:

> "2. that Applicant shall comply with **any requirements** of the Lawyers' Assistance Program and **shall be subject to the supervision of an attorney monitor acceptable to the Board**. . .
>
> 3. that Applicant shall . . . attend and actively participate in at least five AA meetings per week, and document such attendance with an attendance log . . . .
>
> 4. that Applicant shall attend attorney support group meetings one time per week . . .
>
> . . .
>
> 6. that Applicant **shall be subject to random alcohol/drug screens** at the frequency determined by his monitor. . .
>
> 7. that Applicant **shall not engage in any other conduct** that evidences a lack of good moral character or fitness.
>
> . . .
>
> 9. that Applicant **shall reside continuously in Texas** during the period of his probationery license . . . ." [372]

What do you think of these conditions? Isn't the probationary law license controlling the Applicant's very existence and personal life? He has to live in Texas. He must attend between AA and LCL, at least six meetings per week. What about his family? Why can't he miss a few AA or LCL meetings to take his son or daughter to a school activity? What is the definition of "any requirements" in (2) above? Is this really fair? What constitutes in reference to (7) above, "any other conduct that evidences a lack of good moral character?" Don't these provisions give the Board the power to determine where the attorney lives and almost everything he can do in life?

And perhaps the most important question of all. Would you want this attorney to represent you, going up against another attorney who was not subject to such ridiculous conditions or loss of his law

license so easily? Assuming you're not a Schmuck, you would answer, "No." The probationary license concept infringes upon the Applicant's sense of self-esteem, and consequently diminishes a litigant's probability of hiring an attorney who will zealously represent them. What it does accomplish is to provide the Bar with sufficient leverage to squeeze and mold an attorney to fit their diabolical self-interested, irrational quest for power.

Control the lawyer and you control litigation outcomes. Control litigation outcomes and you control the general public. Quite far from the State Bar's falsely asserted goal of protecting the public interest from dishonest lawyers.

VIRGINIA

254 S.E. 2d 71 (1979)

IT'S NOT SO UNORTHODOX

The Applicant was a member of the District of Columbia Bar. She was denied admission to the Virginia Bar on the purported moral character ground that "her unorthodox living arrangement would lower the public's opinion of the bar" as a whole. As a preliminary matter, I note that regardless of her conduct, it is virtually impossible to "lower the public's opinion of the bar" as a whole. Quite simply put, pragmatically speaking, there's a point where the public's opinion of an institution is already so low that it can not get any lower.

She had no criminal convictions or matters reflecting adversely on her character. She was denied admission because of her "unorthodox living arrangement." Specifically, she was living with a man she was not married to. The State Bar's perspective in this case was so irrational that it simply suffices to say the Court ruled in favor of the Applicant.

She never should have been required to incur the time and expense pursuing the appeal. She should have been immediately admitted. What if she had not appealed though? More to the point, were there other Applicants in similar circumstances who didn't appeal, that were denied admission simply because they lived with someone they were not married to? Isn't the Bar simply trying to control the lifestyle of its attorneys, and ostensibly trying to justify their control by giving mere lip-service to the "public opinion?" Incidentally, the answers to the foregoing questions are, "yes", "probably", and "yes."

I read a case like this and can't not help but feel a great sense of shame and disgrace for being a licensed attorney. On the other hand, it could be a lot worse. I could have been a member of the Virginia Bar when this case was decided.

In closing, I would note that a Character Committee, Board or Bar that denies admission to an individual simply because they are living with someone they are not married to, is in all likelihood probably comprised of Bar Committee members who are either unhappily married or simply not "getting any." The concept being that, if you want to be in our Bar, you should be as miserable as we are. [373]

WASHINGTON

690 P.2d 1134 (1984)

A GREAT DISSENT

The Court's opinion in this case is most unusual. The majority loses focus of the primary issue. They may (or may not) have reached the correct, ultimate conclusion, but their reasoning is irrefutably irrational. The Applicant in 1973 was convicted by a jury of second degree murder, and in 1974 with heroin possession. He served 3 years, 8 months and was then paroled. He claimed that he acted in self-defense. The victim was married to, but separated from the Applicant's girlfriend. The victim had threatened the Applicant on several occasions and beat him with a pistol at least once. The Applicant bought a pistol for protection and one night was approached by the victim who reached into a bag. The Applicant shot. A search of the victim's bag later revealed that a gun was inside it.

The Board recommended admission. The State Supreme Court did not agree. This case is therefore, unusual from inception in that both the Applicant and the Board were in agreement, which left the State Supreme Court struggling to find justification for denying admission. I will not dwell however, on whether the Supreme Court had authority to consider the case.

Assuming arguendo, that the Court had legal authority to decide the case, its' denial of admission should have focused on the issues of the crime committed, along with the matters of remorse and rehabilitation. Instead, what it did was focus equally on the crime committed and a trivial allegation that the Applicant engaged in the unauthorized practice of law (UPL) by preparing articles of incorporation for some private businesses.

They look ludicrous. How can you possibly give equal weight to a puny, and constitutionally questionable allegation of UPL which is designed to foster the economic, anticompetitive interests of the State Bar, with the crime of murder? It illegitimates the entire opinion. The opinion states:

> "Simply put, a person who for a fee advises whether to incorporate and then draws articles of incorporation, and who does not think he is practicing law is not qualified to practice that profession."

I disagree and would elucidate the point as follows :

> "Simply put, a Judge who gives equal weight in a Bar admissions opinion to an allegation of UPL which is designed to foster the economic interests of the profession, with a jury conviction for the serious crime of second degree murder is not qualified to be on the bench."

The Dissent is not much kinder than myself, when commenting on the majority's irrationality as follows :

> "I disagree with its focus on facts that **only arguably constitute unauthorized practice of law**. . . .
>
> **. . .**
>
> It may be simple for the majority, but it is not that simple for me. **<Applicant> never held himself out to be a lawyer. He never gave the articles of incorporation to the small business, and the papers were never used. Is merely giving an opinion on whether to incorporate the practice of law ? Possibly so, possibly not, but the question I must ask is, is the majority really denying <Applicant's> admission to practice based on this fact? I cannot believe that it is.**

> . . . The bar association has been involved with this case for over 4 years, and not one member of that organization has ever charged that <Applicant> illegally practiced law. **The counsel for the bar association never notified <Applicant> that this would be an issue.** <Applicant> had no opportunity to rebut charges that he was not qualified to practice based on this incident. The **Board of Governors made no finding on this issue. . . .The majority has raised this issue for the first time on appeal, and then decided it without a fair hearing."** [374]

The Dissent has essentially called the majority liars, by using the phrase "is the majority really denying <Applicant's> admission to practice based on this fact? I cannot believe that it is." I like the style. A Great Dissent.

WEST VIRGINIA

266 S.E. 2d 444 (1980)

TRICKED AND SUCKERED BY THE DECEPTIVE BAR EXAMINERS

The Bar application included the following question, and also provided the following possible answers :

> "21. Do you advocate or knowingly belong to an organization or group which advocates the overthrow of the Government of the United States of America or of the State of West Virginia by force or violence?
>
> Yes No Decline to Answer"

The Applicant checked "Decline to Answer." He was then informed that no further consideration would be given to his application until he answered questions pertaining to his advocacy, membership in organizations, and beliefs with respect to overthrowing the government. He refused to answer the questions and was informed that his application would not be processed. He then filed an action in the West Virginia Supreme Court, which ruled in his favor. The Board maintained that irrespective of his associations or activities with respect to advocating the overthrow of the government, his refusal to answer questions obstructed their investigation and justified their failure to process the application. The Court's opinion states:

> "At the outset, **we do not think it can be maintained that petitioner failed to respond to Question 21** on the character questionnaire. **Petitioner chose one of the three possible answers** which respondents provided to the question. **The questionnaire did not require any further explanation** of the "Decline to Answer" choice **and did not indicate that it was an unacceptable answer."**

Addressing the legitimacy of the questions, the Court writes in reliance on the U.S. Supreme Court's opinion in *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702 . . . (1971):

> "A plurality of the Court found that because the inquiries were **so broad and vague** as to include associations protected by the First Amendment, as well as unprotected ones, **the State could not compel an applicant to answer those questions** as a prerequisite to admission to the bar without violating his or her right to associate."

The Court later notes:

> "We do not think . . . that the questions posed by respondents serve to further that purpose in the least restrictive manner."

The Court then concludes:

> "Finally, respondents maintain that **they are allowed to question applicants about any matter which they deem relevant** to good moral character. **The implication is that respondents have absolute discretion in determining what is relevant to good moral character**. . . . We have determined that the questions asked of petitioner unconstitutionally infringe upon the rights guaranteed to him. . . ."

Footnote 12 of the opinion states as follows:

> "Justice Black, in Baird, and Stolar, recognized questions similar to those posed here as **"relics of a turbulent period known as the "McCarthy era". . . ."** [376]

The most interesting aspect of the case to me, is the fact that the Board would have the audacity to include a selection right on the questionnaire that expressly read "Decline to Answer" and then when it was checked, irrationally assert the ground of "refusal to answer" to justify their failure to process the application. They obviously intended to trick the Applicant and did so by engaging in "misleading" and "deceptive" conduct.

408 S.E. 2d 675 (1991)

EPC- IT'S THE HEART AND SOUL, BABY!

This is one of the most important cases I've come across, because it hits directly on the most unconstitutional aspect of the admissions process. The Applicant brilliantly challenges the premise that Nonattorney Bar Applicants are subjected to a higher standard of character than licensed attorneys. He challenged the admissions process under the Equal Protection Clause which is exactly what I would do.

He disclosed three DUI convictions from 1976, 1987 and 1988 on his application. The opinion presents the following additional facts in a somewhat misleading manner:

> "He also has twenty-five arrests for speeding, with twenty-four resulting in convictions, five other traffic arrests, including two careless driving charges resulting in one conviction; one reckless driving arrest which did not result in a conviction and two other unspecified moving violations arrests with two convictions. . . ."

The foregoing is misleading because, although technically correct that receiving a speeding ticket is an arrest, most citizens consider it to be merely a traffic ticket. The DUI convictions are serious matters warranting consideration, but the severity of the other matters is questionable. The Court appears to inflate their importance by using the term "arrest" beyond the commonly accepted societal view. Buried in Footnote 4 the Court writes:

> "In addition, the appellant updated his application as recently as July 2, 1991, with yet another speeding conviction which occurred in June 1991. The traffic arrest took place . . . when the appellant was stopped for traveling 67 miles per hour in a 55 miles per hour zone."

The key issue in this case is the Applicant's Equal Protection Clause challenge. He asserts that the failure of the Bar to hold licensed attorneys to the same standard as Nonattorney Applicants violates the Equal Protection Clause. He was challenging the fact that licensed attorneys are subjected to a lower character standard than Applicants. The Court rules against him and concludes that attorneys may be held to a lower standard of conduct than Nonattorneys, since at one point in their career they went through the admissions process. The opinion states:

> ". . . The appellant asserts that the denial of his application to sit for the bar examination upon the grounds of character and fitness was premised upon **improper class distinctions made between the appellant . . . and those who were either already licensed to practice law or those seeking reinstatement to practice law.** . . . The appellant argues that "the distinction is improper in that the purpose and intent of legislation and rules promulgated respecting character and fitness is the protection of the public from unqualified and immoral practitioners. . . and that **since both classes of individuals presumably contain unqualified and immoral individuals, there is no rational basis for applying different standards to them.** The appellant finally asserts that it is **particularly invidious that one who has not committed ethical violations by past specific incidents of misconduct is subjected to more stringent regulation than those who have previously committed ethical violations or who are in a position to do so. . . .**
>
> . . . for the sake of the discussion on the equal protection argument, **we will assume the appellant's contention that a higher standard of conduct is required for new applicants.**

> In addressing whether the requirement of a higher standard of good moral character for bar applicants is violative of the equal protection clause, we turn to our decision . . . where we held that **"equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. . . . Consequently, if it is determined that bar applicants are not similarly situated with attorneys already admitted to practice, then a different standard, such as a higher standard of good moral character may be imposed by the state upon the applican**t. . . .
>
> **. . .**
>
> In the present case, legitimate differences exist between bar applicants and those already admitted to the bar, and accordingly, these two groups are not similarly situated. **Those already admitted to practice have met the character qualifications**, have proven their knowledge and fitness to practice law, and accordingly, are governed by a different set of rules than bar applicants. For instance, **attorneys already admitted to practice must practice law in conformity with the Rules of Professional Conduct**, while bar applicants must comply with the Rules for Admission. . . . Denial of admission to the bar exam is simply not equivalent to an attorney who either faces disciplinary action or reinstatement." [377]

The lame nature of the Court's logic rests in the manner they concluded that Bar Applicants and licensed attorneys are Dissimilar. The Court presented two distinctions. The first distinction was that licensed attorneys already met the character qualifications when they were initially admitted. That argument fails rational scrutiny because once five years or so has lapsed from the date of initial admission, the initial character assessment is too remote in time to have current relevancy. The remote nature of prior character dating back more than five years, is an irrational frame of reference to use for assessing current character.

The second irrational distinction the Court makes is that licensed attorneys are subject to the professional rules of conduct. The flaw in this argument is that the impact of such a distinction should be to hold the licensed attorney to a higher, rather than a lower standard of conduct. The attempt by the Court to use this fact as justification for holding Nonattorney Bar Applicants to a higher standard of conduct than licensed attorneys, turns logic on its head.

It was a bad opinion and this Applicant hit upon the most vulnerable point of the Bar admissions process.

1997.WV.276 (1997) VERSUSLAW
SUPREME COURT OF APPEALS OF WEST VIRGINIA; NO. 24040 (1997)

The Applicant graduated from Howard University in 1968. In 1974, he participated in a conspiracy to commit armed robbery during which a female police officer was shot and killed by the Applicant's accomplice. At trial, he entered a guilty plea to second degree murder, conspiracy and attempted armed robbery. He was sentenced to fifteen years to life in prison. While in prison, he was a model prisoner and released after fifteen years. He then went to law school and graduated in 1994. Since the events of 1974, it appears his record was wholly unblemished and in fact nothing short of remarkable. The Board determined that he had the requisite character to be admitted to practice. The State Supreme Court disagreed.

I present this case for only one reason. Whether the reader believes this Applicant who committed an extremely serious offense in 1974 should be admitted or not, it is absolutely irrefutable that the Board's decision to grant admission was wholly inconsistent with their refusal to certify the Applicant in the prior case, who had three DUI convictions and a lot of traffic tickets. [378]

1997.WV.423 (VERSUSLAW) (1997)
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA; No. 23935

This case involves reinstatement for a suspended attorney. The suspension followed his plea of guilty to six federal misdemeanor charges of cocaine possession in 1989. The Court reinstates him effective January 1, 1998 subject to the following conditions:

> "upon reinstatement . . . shall be supervised for a period of one year by an attorney in good standing with the State Bar. . . ."

I present this case for two reasons. First, reinstating an attorney convicted of cocaine possession is inconsistent with the denial of admission to the Applicant who had only three DUI convictions and traffic tickets. This disparity in treatment exemplifies the Equal Protection Clause infirmity of the admissions process. The suspended attorney is held to a lower standard of conduct with respect to reinstatement than the Nonattorney Applicant in an initial admission.

Second, the concept of reinstating an attorney, subject to a supervision requirement is crap. Either he has the character to be reinstated or he doesn't. The supervision requirement places the attorney at a great disadvantage, compared to other attorneys not under supervision. Consequently, the clients he represents, who probably are unaware of his restricted and limited status, are at a disadvantage.

What the Court was doing was trying to control this attorney by holding the carrot of licensure above him. That's immoral and detrimental to the public interest. [379]

WISCONSIN

Generally speaking, the Wisconsin line of Bar admission cases are characteristic of a Board of Bar Examiners that consistently makes numerous, material administrative errors, and then tries to conceal their own incompetency by denying admission to the Applicant through utilization of an unreasonably restrictive interpretation of the Applicant's minor errors. In doing so, the Board obviously evinces a pattern of misleading conduct that lacks candor. They are definitely one of the more tricky and deceptive little Board of Bar Examiners.

303 N.W.2d 663 (1981)

YOU HAVE TO DISCLOSE, BUT WE AT THE BOARD DO NOT

The Applicant initially did not answer a question pertaining to previous attempts to be admitted to the Bar of another jurisdiction. He then did supply information regarding several unsuccessful attempts to take the Indiana Bar exam. On September 30, 1980 the Board of Professional Responsibility recommended his admission to the Board of Professional Competence. In a letter dated October 1, 1980 to the Applicant he was informed of the recommendation, and notified that his application would be considered at the next meeting of the Board of Professional Competence.

The Board's letter however, "failed to disclose" a material fact. Specifically, it did not disclose the meeting date. In addition, the Applicant was not invited to attend the meeting and when it took place his application was rejected. In a letter dated November 17, 1980, the Board informed him that he was denied admission.

That letter also "failed to disclose" material facts. Specifically, no reasons were provided for the denial, as the Board apparently wanted to conceal the reasons. The Court decides in favor of admission writing:

> "The question before us is whether the due process clause of the federal constitution requires that a bar admission applicant who is refused certification . . . be notified of the grounds for the board's conclusion and be given an opportunity to respond to or rebut that determination.
> **. . .**
> Under the Supreme Court Rules there are no provisions requiring the board to notify the applicant of its determinations and conclusions regarding his or her moral character. **There are no rules requiring that the applicant be given an opportunity to rebut or respond to the board's determination.**
>
> **It is claimed that this procedure is constitutionally unsound.** The applicant argues that as a matter of due process of law he was entitled to be notified of the results of the board's investigation and that he had a right to challenge the basis of the board's conclusions. **We agree with the applicant.**
>
> . . . The board takes the position that <applicant> was not certified because he failed to fully disclose all relevant information on his initial application. . . . The board claims that when <applicant> released the Indiana bar exam materials to it . . . the applicant "admitted" that he had not made a full disclosure on his earlier applications. The board concludes that the partial

disclosure on the original application as evidenced by the release of additional materials supports the conclusion of the board without the need for an evidentiary hearing. . . .

The board's argument is not persuasive in several respects. At the outset we not that the board's determination as set forth in its November 17th memorandum is not clearly predicated upon the applicant's nondisclosure of material facts. Secondly, even if it were so predicated, the board still has failed to avoid the impact of the Willner rule. . . .

The applicant was entitled to be apprised of the reasons which justified the board's decision and he was entitled to an opportunity to respond to that determination. . . ."

Two points are particularly interesting. First, the Board is not alone in its culpability. Note the phrase above that reads:

"Under the Supreme Court Rules there are no provisions requiring the board to notify the applicant of its determinations and conclusions regarding his or her moral character."

The State Supreme Court had screwed up by failing to enact the necessary rules to satisfy constitutional requirements of the U.S. Supreme Court's opinion in *Willner v. Committee on Character,* 373 U.S. 96 (1963). It is noteworthy that Footnote 2 of the opinion reads:

"The Supreme Court Rules relating to admission of attorneys to the practice of law have been amended by an order dated December 29, 1980. . . ." [380]

Apparently, the State Supreme Court was fixing the problem so that it wouldn't occur again in the future. The second point, is that it is disturbing the Board would deny certification to the Applicant based on his purported failure to disclose information, when the Board itself had failed to disclose material information. They didn't disclose the reasons for denying admission as constitutionally required. This obviously reflects poorly on the character of the Board members and their ability to engage in the practice of law.

375 N.W.2d 660 (1985)

WE AT THE BOARD WRITE THE RULES, NOT THE STATE SUPREME COURT

The Applicant was admitted to practice law in Minnesota in October, 1977. He was employed as a staff attorney for the Native American Rights Fund in Colorado, where he practiced law after obtaining special permission from the Colorado Supreme Court, even though he was not a member of the Colorado Bar. He applied for admission to the Wisconsin Bar, pursuant to a provision that allowed for admission of attorneys licensed in other jurisdictions who had engaged in the active practice of law in another state for three of the last five years. The applicable provision SCR 40.05 stated as follows:

> "(1) An applicant shall satisfy the requirements . . . by presenting to the clerk :
> . . .
> (b) proof that he or she has been primarily engaged in the active practice of law in the courts of the United States or another state . . . for 3 years within the last 5 years . . . ."

The issue presented to the Court was whether practicing law in Colorado under special permission from the Colorado Supreme Court, but without actually being a Colorado licensed attorney, met the requirements of SCR 40.05. The Board determined that it did not, and the Wisconsin Supreme Court disagreed, ruling in favor of the Applicant. The opinion states:

> ". . . We conclude that SCR 40.05(1)(b) does not implicitly require applicants to have been admitted to the practice of law in other jurisdictions in order to have their active practice of law in those jurisdictions qualify under that rule, provided their practice of law did not constitute the unauthorized practice of law. . . ." [381]

The disturbing aspect of this case, is that the Board denied the application initially. The rule irrefutably contained no requirement regarding admission to the practice of law. It only required the Applicant to have been, "primarily engaged in the active practice." The Board was essentially dissatisfied with the rule enacted by the State Supreme Court, and just decided to rewrite it on their own. They didn't have a leg to stand on. In doing so, they abandoned the rule of law and took matters into their own hands.

456 N.W.2d 590 (1990)

NOW, WHO'S REALLY BEING MISLEADING AND LACKING CANDOR?

This case is an ethical atrocity demonstrating the lengths to which the Wisconsin Board of Bar Examiner will go to deceptively conceal their incompetency. The Applicant disclosed three offenses she was charged with in Minnesota. Two were dismissed and she pled guilty to marijuana possession. Sentencing was deferred and she was required to complete a counseling program. She disclosed such in response to the question that inquired :

> "ever been charged with, convicted of, or entered a plea of guilty or no contest to a civil law violation . . . ? (Omit parking tickets.)"

The Board's investigation then revealed 10 undisclosed traffic charges which included a 1985 conviction for speeding and a 1987 conviction for speeding. Typically, most citizens view such as "traffic tickets," although technically, depending on the State, they may be considered as "convictions." She was questioned regarding the three Minnesota charges (two were dismissed) which she had disclosed. The Board determined that her explanations were inconsistent with those she gave at the time the incidents occurred and denied admission. They informed her of their decision in a letter dated June 9, 1989 and provided her with a copy of their report. One major problem though.

The Board edited the report that they gave her. They intentionally failed to disclose material matters in the copy of the report they provided to her. They concealed information from her. This was an apparent attempt by the Board to frustrate her attempts to respond to the substance of their conclusions. The Court rules against the Applicant stating:

> "It must be emphasized that the basis of the decision to decline certification of <applicant's> character and fitness to practice law was not her conduct that led to the three criminal charges and the numerous traffic offenses. Rather, BAPC determined that <applicant> did not meet her burden to establish good moral character and fitness to practice law solely by virtue of the inaccuracies and omissions in her admission application.
>
> In her petition seeking review of that decision, <applicant> first contended that she was denied due process because BAPC's June 9, 1989 letter, including **the edited copy** of the BAPR investigative report, did not sufficiently apprise her of the basis on which BAPC initially determined she did not satisfy the character and fitness requirement. . . . <Applicant> also contended that BAPC's ultimate findings and conclusions did not give her adequate notice of the basis for its adverse decision but merely stated that she had not been "factually accurate as to the three charges she disclosed" and "failed to disclose 10 Minnesota traffic charges . . . three Wisconsin traffic convictions. . . .
>
> . . . While the BAPC letter notifying <Applicant> of its initial adverse determination itself did not specify the reasons for its decision, it stated that the decision was based on the BAPR adverse recommendation. . . .
>
> **. . .**
>
> <Applicant> next argued that BAPC's findings and conclusions were legally insufficient to support a denial of certification. . . . Her argument rests on the mandatory language of SCR 40.06(3) requiring BAPC to decline to certify character and fitness of an applicant who knowingly makes a materially false statement of material fact. **<Applicant> contended that the finding that she was not "factually accurate" in her description of the three criminal**

charges on the application was not equivalent to a finding that her response was either materially false or concerned material facts. She specifically asserted that the undisclosed traffic offenses did not rise to the level of material fact. Further, she argued, BAPC made no finding that she "knowingly" made materially false statements of material facts.

In response, **BAPC took the position** that SCR 40.06(3) **does not divest it of discretion to deny** character and fitness certification of an applicant who makes false statements or fails to disclose **facts that may not rise to the "material" level.** . . . BAPC asserted that it retains the discretion to deny certification to one who fails to provide information or makes misrepresentations in an application, **even if not done knowingly or not concerning material facts. . . .**

We agree. . . . False statements and failures to disclose facts that arguably are not material may, because of their nature and number, warrant the conclusion that the applicant lacks the integrity and candor required. . . .

We find no merit in the other arguments made by <Applicant> . . . that her failure to disclose . . . was not "knowing" because the application question does not specifically inquire about traffic offenses. . . .

Also lacking merit is <Applicant's> argument that she was denied due process by BAPC's failure to afford her an adjudicatory hearing following its initial adverse decision. . . ."

What the Court did here was negate the materiality element of nondisclosure in its' entirety. The operative phrase in the above passage is:

"BAPC asserted that it retains the discretion to deny certification to one who fails to provide information or makes misrepresentations in an application, **even if not done knowingly or not concerning material facts. . . ."**

The acceptance of such an irrational premise has obvious results. In this particular case, the Applicant was penalized for failing to disclose traffic tickets. This is notwithstanding that the application did not even inquire into the existence of traffic tickets and included the phrase:

"(Omit parking tickets.)"

Why should it reflect negatively upon an Applicant if they unintentionally fail to disclose immaterial facts. Taking the matter further, the Court's opinion could reasonably be construed as placing an affirmative obligation upon an Applicant to disclose all immaterial facts even though no inquiry is made. This would require the Applicant to inform the Board of every single event that occurred in their entire life from the day they were born. Perhaps, the manner in which the Court attempts to avoid the ridiculous result occurring from a reasonable construction of the Board's ill-chosen language is in the passage that reads above:

"False statements and failures to disclose facts that arguably **are not material may, because of their nature and number,** warrant the conclusion that the applicant lacks the integrity and candor required. . . ."

Doesn't considering the "nature" of the nondisclosure bring assessment right back to the determinative issue of whether it is "material?" Both the Court and Board are playing an extremely, misleading and covert game by utilizing manipulative logic and parsing of word meanings. It can be summed up as follows. The Board and Court first determine that immaterial nondisclosures can be a ground for denial. The Court then determines that immaterial nondisclosures should be considered by assessing their "nature." Yet, it is precisely their "nature" that determines whether they are "material." The end result is that notwithstanding the express language used, the Court has affirmed the importance of materiality, even though it deceptively denies admission by relying on immaterial matters. The Court's logic is lame.

Why did the Board and Court take such an irrational stance with respect to this Applicant? The answer I believe rests in three footnotes demonstrating the Board's incompetency. Footnote 3 states:

> **"The June 9, 1989 BAPC letter mistakenly referred to a March, not May, 1989 meeting. Also, the edited copy of the BAPR staff counsel report attached to that letter bore a "received" stamp dated June 9, 1989, although the original report was stamped "received" April 28, 1989."**

Footnote 4 then reads :

> "In its cover letter . . . **BAPC incorrectly termed her application as one on proof of practice elsewhere, rather than on bar examination. . . ."**

Footnote 5 reads :

> "<Applicant> asserted that she had been invited to Madison to meet with a BAPR investigator to discuss issues . . . **but that discussion turned out to be a formal deposition, which she attended without notice**. . . ." [382]

The Board played countless deceptive and misleading tricks on the Applicant. They misled her with respect to the nature of the inquiries to be made as indicated in Footnote 5. They gave her an edited report to conceal information. They failed to adequately inform her of the reasons for denying admission. At best they made an administrative error regarding the "received" stamp, and at worst that matter constituted falsification of an official document by the Board. They also misclassified her application, as indicated in Footnote 4 of the opinion. The Court then played irrational and manipulative, tricky games with logic to support the Board's decision. Why did all this occur? The answer I believe is that the Board looked so irrational that the Court felt a desperate need to protect it from an Applicant who was on to their little covert game of deception. The Court and Board were transparently pathetic.

492 N.W.2d 153 (1992)

The Applicant filed his application on December 19, 1990. At that time he apparently had never been convicted of a crime and correctly answered "No" to the inquiry addressing convictions. He answered "yes" however, to the question:

"(b) Are you presently subject to any such pending charges ?"

Apparently, he had been charged with driving under the influence of alcohol, reckless driving and resisting arrest, but the cases had not yet been adjudicated. On January 7, 1991 he pled "no contest" to the DUI charge, and on January 18, 1991 pled "no contest" to the other charges. On February 11, 1991 he amended his Bar application, changing his answer regarding convictions from "No" to "Yes" and his answer regarding pending charges from "Yes" to "No." The facts presented in the opinion appear to indicate he handled disclosure of these matters properly.

In addition, his amendment disclosed two California violations on his driving record. The Board wrote him a letter on April 24, 1991 which stated in part:

> "On February 25, 1991, you executed an amendment to your application in which you disclosed these matters following notification from this agency dated February 15, 1991 that it would be necessary for you to submit your driving record."

The Board's letter stated matters falsely. In fact, the Applicant's amendment was received by the Board not on February 25, 1991 as their letter indicated, but rather on February 11, 1991, four days before they had sent their letter asking for a copy of his California driving record. The Board was apparently attempting to falsify the record to make it look like his amendment was filed in response to their inquiry, when in fact such was not the case. The Court's opinion states:

> **"In fact, <Applicant's> amendment to his application was received by the Board on February 11, 1991, four days before the Board wrote to him asking for a copy of his California driving record.** The Board's letter perhaps referred to the fact that the amendment <Applicant> originally filed had not been notarized and that he submitted a notarized copy of the amendment to the Board on the date he wrote the bar examination."

The Board's little game had unraveled. On May 21, 1991 they wrote the Applicant that he would need to have an alcohol and drug assessment carried out by a professional. The Applicant informed the Board that he had attended a "statutory alcohol treatment program" in California but could not locate a copy of the certificate. The Board wrote him a letter recommending that he contact his local human services department or personal physician for a referral. The Applicant telephoned the Board and informed them that since he was not in Wisconsin he could not have the assessment done in Wisconsin. He reiterated that he had completed a program in California and asked them to inform him whether that was sufficient. The next information he received was a letter dated July 26, 1991 informing him that the Board intended to deny certification because he failed to furnish proof of a drug and alcohol assessment. The Court rules in favor of the Applicant stating:

> "In his brief on review, <Applicant> argued that the facts **do not support the Board's conclusion** that he "knowingly" made "materially" false statements of fact when he responded in the negative to the questions in the original application he filed concerning pending traffic violations. Moreover, he contended, his incorrect answers to those questions were not an attempt to conceal facts from the Board and, as they were not knowingly made and did not

concern material facts, they were not sufficient to support the Board's decision. . . . In addition, <Applicant> asserted that he did not refuse to comply with the Board's requirement that he complete an alcohol and drug assessment ; rather, while he was attempting to determine with specificity what that requirement entailed, the Board issued its decision. . . .

<Applicant's> arguments are persuasive. The record establishes that <Applicant> amended his application . . . several days prior to the Board's request. . . . That amendment, submitted without prompting by the Board, supports <Applicant's> explanation. . . .

Because we reverse the decision of the Board declining to certify <Applicant's> character and fitness for bar admission for the reasons stated, it is unnecessary to address the numerous constitutional arguments set out in his brief. **Furthermore, in the course of this proceeding <Applicant> filed a number of motions . . . including a motion objecting to the record filed by the Board on the grounds that it was not authenticated, not certified, not signed under seal and that the Board did not serve a copy of it on him**. . . . We deny those motions ex parte, as none of them has merit."

The Applicant wins. The Board's handling of the case was characterized by bumbling and stumbling. Essentially, the standard of conduct that is characteristic of many State Bars in the admissions process. Particular attention should be focused on the last two sentences above, which I cite again in part:

"Furthermore, in the course of this proceeding <Applicant> filed a number of motions . . .**including a motion objecting to the record filed by the Board on the grounds that it was not authenticated, not certified, not signed under seal and that the Board did not serve a copy of it on him. . . . We deny those motions ex parte, as none of them has merit."** [383]

The Court appeared anxious to dispose of the serious matters raised by the Applicant and provided no support or reasoning for their determination that the Applicant's motions lacked merit. The obvious question is whether the Applicant's allegations were true or not. If they were not true, then why didn't the Court say so? Rather instead, the Court simply stated that the motions were denied ex parte, as none had merit.

The disturbing questions one is left with after reading the opinion are as follows. Did the Board serve the Applicant with a copy of the record? If so, then they should have proof of service corroborating such. Why didn't the Court address proof of service? If there was no proof of service in existence, then the failure of the Board to provide notice to an opposing party raises serious issues pertaining to the Board's integrity. That integrity or alternatively the lack of it, appears doubtful even when the evidence is viewed in the light most favorable to the Board.

1999.WI.42694 (1999) (Versuslaw)
Case No. 98-2487-BA; June 15, 1999

ADMIT THIS GUY, JUST DON'T GO TO HIS PARTIES

The Applicant in this case liked to party and it got him in trouble. In 1995, he was involved in what the opinion appears to indicate was a relatively minor altercation outside of a bar which resulted in a plea of "no contest" to disorderly conduct, for which he was fined $ 147. In 1991, he hosted a beer party at which those attending purchased a cup to obtain alcoholic beverages. The police gave him 21 citations for providing alcoholic beverages to underage persons. He explained to the Bar those citations resulted from enforcement of the 21-year-old drinking age, which he opposed. Undoubtedly, not a particularly good explanation by him.

He pled "no contest" to three charges as a result of the incident and paid $ 2000 in forfeitures. He was also cited for marijuana possession, but that charge was dismissed. While a student, he received seven citations from university housing authorities including one for a minor fistfight. The Board denied admission and the Court agreed.

I would admit him. Nothing he did appears to have been particularly heinous. The fistfight and bar altercation bother me somewhat, and warrant consideration since a disorderly conduct conviction resulted. I do not believe they are sufficient egregious however, to deny the man his profession. I must assume that if the fights resulted in serious injuries, the charges would have been assault and battery, rather than just disorderly conduct. The Board found that he:

> "**explained those incidents** to the Board **in a manner which** denied or minimized his culpability or responsibility for them"

Apparently, the Applicant had characterized the "minor fistfight" as a "shoving match." The Board obviously lacked competent ability in cognitive reasoning, because explaining facts surrounding incidents in a manner to minimize culpability, is what is known as "defending yourself." The distinction between a "minor fistfight" and a "shoving match" is difficult to discern. What happened in this case was that the Board launched a frivolous personal attack against the Applicant, and then held the manner in which he explained incidents against him. He appears to have had a legitimate basis to present the facts in a manner placing himself in a favorable light. There is no reliable indication that he testified untruthfully, but rather instead the issue was that he presented facts in a manner reflecting well upon himself. That is exactly what lawyers are supposed to do. If the Board doesn't allow the Applicant to do it, then we are left wondering whether licensed Wisconsin attorneys fail to present facts to Courts in a manner placing their clients in a favorable light. The handling of this case by the Board, suggests that licensed Wisconsin attorneys are taught to sell out their clients. The Board made the following incredible statement:

> **"Although the Board does not believe** that your 1995 nor your 1991 convictions nor your selective disclosure to the Law School **individually or together disqualify you from admission** to the bar, **the Board finds that your explanations** of the events leading to those convictions, coupled with your accounts of them and of the conduct associated with them **raise substantial doubt. . . ."**

The Board in the foregoing passage expressly stated that the matters were not disqualifying either individually or collectively. It was the Applicant's explanations they didn't like. That's crap. Conduct is either disqualifying or it isn't. The Board was logically lame to determine that the incidents

were not disqualifying, but the attempt to explain them by minimizing culpability constituted grounds for denial of admission.

One disturbing procedural aspect exists in the case. The Board wrote the Applicant a letter noting that if he wanted a Hearing, he had to request one specifically, demonstrating facts that could not be presented in writing. The Applicant requested a Hearing to explain that he was not attempting to conceal anything or mislead the Board. The Board denied his request and then had the colossal gall to assert before the Court that they were prohibited from granting a Hearing. This is after they themselves sent him a letter explaining that if he wanted a hearing, he could request one. The Board's misleading account of the "Request for Hearing" incident reflects adversely on their moral character. The Court's opinion addresses the Board's lack of candor in handling the request for hearing as follows :

> "At oral argument in this review, counsel for the Board asserted that the Board was prohibited from granting <Applicant's> request for a hearing by the mandatory language of SCR 40.08(2) : "The board shall grant a hearing to an applicant only upon a showing that there are facts bearing on the applicant's case that cannot be presented in writing." **While that rule may be sound in respect to objective facts, if followed literally, it might prevent the Board from reaching an informed determination on facts not susceptible of objective determination,** such as the applicant's sincerity, remorse and other matters. . . . Accordingly, we direct the Board to consider the operation of that rule in this respect and, if it is deemed necessary or appropriate, that it propose its amendment." [384]

As a matter of law, it seems to me that in light of the foregoing, the Court should have at least remanded the matter back to the Board. The Court clearly knew that the Board's irrational position of denying a Hearing by relying on the court rule had the effect of an injustice. The Court also was conceding that the rule was unfair. Rules should be followed literally. Otherwise, everyone will interpret them to suit their own needs. The Court was ethically unjustified in flatly denying admission without having provided the Applicant with a Hearing to explain himself.

As stated previously, I do not feel the presented facts even mandated a Hearing to grant admission. I would admit the Applicant outright. But, I probably wouldn't attend any of his parties.

601 N.W. 2d 642 (1999)
Case No.: 99-0158-BA (1999)

This case presents an instance where I have to believe the members of the Wisconsin Board all got together and decided they wanted to try and look as stupid as possible, just to see what they were able to get away with. The Applicant was denied admission on the ground he allegedly plagiarized an academic article, by failing to include some footnotes. No charges were ever filed against him, nor was any academic disciplinary action ever taken. Apparently, he and the Department Chair did informally agree that he would discontinue his employment at the University. The key passage of the opinion reads as follows:

> "<Applicant> next argued that the **Board violated his right of due process of law by obtaining information** concerning his university employment and his plagiarism **after holding a hearing and then using that information to his detriment. It was his contention that if those materials had been available to him prior to that hearing, he could have examined them, refreshed his recollection, and given an appropriate explanation for them.** In support of that contention, <Applicant> relied on the court's decision in . . . 101 Wis.2d 159, 303 N.W.2d 663 (1981), in which the court addressed a bar admission applicant's due process right in the bar admission process.
>
> That reliance is misplaced. The court held in <303 N.W.2d 663> only that **the minimum required by the due process clause is that the bar admission applicant be apprised of the specific grounds for the Board's decision not to certify. . . . and have an opportunity to respond to that decision. . . .** Here, as the Board asserted, it was not until the hearing that the Board learned of <Applicant's> position that he had prepared two separate drafts of the article. . . .
>
> **Nonetheless, better practice would have been for the Board to have notified <Applicant> of the additional material, even though it had been adverted to in the course of the application and hearing process, and of its intent to rely on that material in reaching a determination on the question of his character. . . ."** [385]

I am continuously amazed at how Courts recognize that the Bar Boards engage in deceptive, misleading conduct demonstrating their lack of candor, yet simultaneously refuse to take action with respect to their transgressions, while unhesitatingly denying admission to Applicants. The last paragraph above confirms the Court knew that what the Board did was deceptive, misleading trickery and yet the only one penalized in this case was the Applicant. The Court penalizes the victim, rather than the transgressor.

The Board members are the least competent from a perspective of moral character to assess another individual's moral character. The reason is simple. They lack the requisite integrity and appreciation for the U.S. Constitution to do so fairly. Also, they have a self-interested monetary motive to exclude future competitors from their ranks. In furtherance of such, they consistently fail to disclose facts for the purpose of intentionally deceiving Applicants and the general public. They function from the perspective that it is alright for the Bar to account for its' conduct in a manner that places it in the most favorable light, yet seek to deprive Applicants of the ability to defend themselves against unwarranted and unsubstantiated personal allegations. The Boards are misleading, untruthful, deceptive, lack candor, don't fully explain their underlying conduct in an open and frank manner and overall lack good moral character.

21

THE DAYS WHEN U.S. SUPREME COURT JUSTICES RAISED A LITTLE HELL

> ". . . the Supreme Court is nothing other than nine sometimes wise, sometimes unwise, but always human men." [386]

Most everyone at some point in their life gets into some type of trouble or controversy which hopefully they overcome and become better individuals for having experienced. U.S. Supreme Court Justices have been no exception. I present the following to demonstrate the need for a Bar admissions process that does not result in exclusion from the practice of law of people who ultimately become the greatest legal minds in the nation. Most of them (although not all) are Justices who I believe, became more morally qualified and of stronger character, as a result of trouble they got into and learned from. To this extent, that which might result in their exclusion from the practice of law today, is specifically what inspired the greatness within them. As you read this section, reflect upon whether these Justices might have difficulty today meeting the contemporary irrational standard of "good moral character" applied by State Bars. The most significant point I seek to make is that the Justices are not the infallible, always wise, detached, apolitical, impartial, unbiased, individuals they claim to be. Quite to the contrary, like everyone else, they come loaded with an abundance of emotional sensitivities, insecurities, vanities, errors in life, and errors in judgment. The Greatest Justices we have had, have been more than anything else, human beings who have lived life to its fullest and have had many, many vices that would today be condemned by pompous, hypocritical, sanctimonious State Bars and State Supreme Courts.

U.S. SUPREME COURT JUSTICE WILLIAM O. DOUGLAS

The title of the first volume of his autobiography describes the man as good as anything else. "Go East, Young Man." The nonconformist adaptation of the old saying, "go west, young man." Douglas later continued his autobiography in a second volume, "The Court Years." He grew up in poverty and always considered himself a loner. He had sympathy for the radical and was viewed by many as a radical. He was the first U.S. Supreme Court Justice to hire a female law clerk, and the longest serving Justice ever on the Court. He tells the following stories of his childhood:

> "Every summer, starting at the age of eleven, I disappeared into the wilds of the Cascades for three weeks. Even I did not know where I was going. During those absences, Mother must have died a thousand deaths, and if the following letter is typical, the news I sent home was scant comfort:
>
> Dear Mama and J.D.R. and Bill July 11, 1915
> If the mosquitoes don't chew me up before I get them I will attempt to drop you a line. . . ." [387]

> "Our backyard neighbor on Sixth Avenue was a man whom we disliked. He was small and wiry, and thoroughly obnoxious to us. We spent hours each Halloween in wait for him to leave his home and enter his outhouse. Once we heard the latch click, we would give one big heave and push it over with the door down, leaving him two possible exits. We met with success year after year. I did not understand the German he spoke, but I could tell the substance of the imprecations coming from the pushed-over little house." [388]

> "While there were many children's parties in Yakima, we were never invited to a single one, and we were far too poor to have one in our own home. . . . In the after years I thought it was a blessing that I had not. For if I had been united with the elite of Yakima even by so tenuous a cord, I might have been greatly handicapped. To be accepted might then have become a goal in later life, an ambition that is often a leveling influence." [389]

As a teenager, he became what is known as a "stool pigeon" for the local police and tells the following story:

> "That is why he approached me. Would I, for one dollar an hour, spend Saturday and Sunday nights "working Front Street"? My instructions were, "See if you can get a woman to solicit you. See if you can buy a drink from someone. When the night is done, check in at the office, execute an affidavit, and the police will move in." [390]

> "And so a teen-age boy became a stool pigeon in the red-light district. Never did I have such a shabby feeling, and in the end, never did I feel sorrier for people than I did for those I was supposed to entrap." [391]

In the fall of 1916, he attended Whitman College on a scholarship and tells the following story:

> "Students have always had their protests, and my generation at Whitman was no exception. Most of us started with a dislike of President Penrose and his pompous manner. . . .Our peak of reaction against him personally was an episode during an outdoor opera held on the campus pond.
>
> President Penrose was coming across the pond in a skiff, his fine barritone voice resounding across the water. . . . Still singing, Penrose prepared to leave the boat by mounting a few steps on a short staircase built to the water's level. But we had sawed the step, and our president's barritone was quickly muffled by the murky waters of the pond." [392]

After graduating from Whitman College, he taught high school in Yakima, Washington for a short period. He then received a scholarship to Columbia law school, but there was one problem. He had only $ 75 and no way of getting from Washington State to New York State. So he hopped a freight train and traveled across the country. In law school, he took up drinking and smoking. He writes:

> "In New York City, drinking was the thing to do. So I started taking a few drinks, mostly of miserable gin.
>
> After I got to Columbia, I also tried very hard to learn to smoke cigarettes. . . .

. . .
Having acquired the habit, however, I became an inveterate smoker. I . . . became so accomplished that I could smoke three packs a day." [393]

He worked his way through law school by tutoring other students and writes:

"I prepared students for college-entrance examinations for Princeton, Yale and Columbia. To obtain my services, . . . students needed to be both stupid and rich. My boast was that I never failed to get even a dumb student into Princeton." [394]

Although he graduated second in his class at Columbia Law School, he got a "C" in constitutional law which he writes about with pride as follows:

"Meanwhile, I had formed the Powell C. Club. Combing school records I collected the names of men who had received a C from Reed Powell and who later became prominent in the law. . . . Our purpose was to remind him of his fallibility in handing out grades in constitutional law." [395]

Both William O. Douglas and Hugo Black consistently ruled in favor of the Applicants in State Bar admission cases. U.S. Supreme Court Justice John Harlan consistently ruled against the Applicants and in favor of the Bar. Harlan himself, however was no choir boy. Douglas writes the following story about John Harlan when they worked together early in their careers:

"John Harlan, later to be on our Court, was at the Root-Clark firm. The big firms in those days held an annual party, a stag affair in a suite in some midtown hotel. . . . John Harlan used to tell, with humor . . . of a party his firm had in the Commodore Hotel. They ordered up a piano to make the occasion more festive, and by four in the morning every sliver of the piano - every key, every string, every screw or nail, every bit of wood - had been thrown out the window." [396]

Douglas tells the following story about working in New York City:

"In New York City, I learned about the devilish work of the police. . . . When I practiced in Wall Street, the police were obtaining confessions by tying suspects in dental chairs and drilling their live teeth. It was a technique Hitler later used in Germany." [397]

He was universally recognized as a champion of the poor man and writes:

"Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy. Yet, in 1973, the Court in *United States v. Kras* (409 U.S. 434), held by a five-to-four decision that an indigent who could not pay the bankruptcy filing fee could not be discharged of his debts." [398]

As a child, he was physically very weak. He describes how that became a catalyst for him throughout life:

"But my rebellion against the shame of being called a weakling had lasting effects. As already noted, it caused me to become very much a loner. Moreover, it inured me in a subtle way to all criticism. Not that I enjoyed criticism, I certainly did not, but criticism never made me turn tail and run. Rather, it impelled me forward into the thick of the fight." [399]

He was married four times. At age seventy, he married his fourth wife, Cathy a law student at American University. He met her one evening when she waited on his table in a Washington restaurant.[400] His children from a prior marriage came to resent him for many different reasons, and so his following thoughts on raising children are not all that surprising:

> "Few people I have known are competent to be parents. . . .
> . . .
> I doubt if I rated high as a father although I did receive a Father of the Year award once. I think it is a near-impossibility for a child of a celebrity to be "normal." The son of a coal miner or the daughter of a charwoman has no competition, the sky being the limit. But what chance did FDR's sons have? [401]

He writes about the highly controversial case of Alger Hiss, which was a product of over-zealous Congressional investigations intended to filter out Communists, at any cost to those who were not:

> "The people I thought were members did not include Alger Hiss, and though Hiss later received an overwhelming volume of adverse publicity he was never tried or convicted of espionage or sedition, only of perjury.
>
> Hiss was tried twice, the first jury being unable to agree. The second jury returned a verdict of guilty on the perjury counts. Reed and Frankfurter; while members of the Court, testified at the first trial as character witnesses. So when the Hiss case reached the Court on a petition for certiorari, Reed and Frankfurter, being disqualified, did not vote. Neither did Justice Tom Clark because he had some connection with the case when he was with the Department of Justice. That left six Justices, a bare quorum. . . .
> . . .
> Thus a six-man Court, with only Black and me voting to grant, denied the petition. If either Reed or Frankfurter had not testified at the trial, we would doubtless have had three to grant; and in my view no court at any time could possibly have sustained the conviction.
> . . .
> . . . the result of the Hiss case was to exalt the informer, who in Anglo-American history has had an odious history. It gave agencies of the federal government unparalleled power over the private lives of citizens." [402]

Commenting generally on the Congressional investigations, Douglas writes as follows:

> "Parallelism was really the high crime. If one believed in free medical care, he was a communist because Russia had that system. If one proposed disarmament. . . he was a communist because Russia proposed it too. . . .
> . . .
> . . . The low ebb was reached when the committee investigated the movie None But the Lonely Heart. In this film a mother ran a store, and her son said, "You are not going to get me to work here and squeeze pennies out of little people poorer than I." This line was taken as evidence that the movie was designed to criticize the free enterprise system, to make people lose faith in it, so that the communists would take over. . . .
> . . .
> . . . It became dangerous to be a free-wheeling and innovative person. Only those wearing homburgs and neat clothes and thinking in Legionnaire terms were beyond reach. Thus did this

early witch hunt have a great leveling effect, driving some of our best men and women out of the federal service.

. . .

. . . committees were more interested in publicity than in the truth; they thrived on accusation and made it the basis for casting a citizen into the outer darkness. . . ." [403]

In his second book, "The Court Years," he comments further about the congressional hearings as follows:

"Another defect of these hearings was that the charges against employees were worded in the broadest possible terms. The usual pattern was to charge the employee with "sympathetic association" with named individuals or named organizations. There was no statement of why the employee was deemed to have been in "sympathetic association. . . .""" [404]

Douglas emphasizes how so very often, those that engage in abusive investigative tactics are typically the most unscrupulous and deceptive individuals, when he writes about former President Richard Nixon (a key player in the Congressional investigations):

". . . under the Nixon regime, the accused need never know who his accuser was; and under the Nixon regime, a person could be condemned not for his actions, but merely for his thoughts or beliefs." [405]

It was Douglas' opinion that the real threat was not from those being investigated, but rather with those doing the investigating, as exemplified by the following passage:

"The timid, frightened, cautious men were the real "security" risks. They cast into oblivion the men of talent. That is the price we pay when we forsake the formula of an open society." [406]

He was strongly opposed to the executions of Julius and Ethel Rosenberg, which he tried to stop and describes the event as follows:

"And when that happened the people in this country experienced a thrill. Mrs. Rosenberg was the first woman to be executed. She, like her husband, was electrocuted and her death received the greatest publicity. What does a woman who has received a lethal electric shock look like? The photographers were accommodating. The front pages the next day showed Mrs. Rosenberg's face as the electric charge hit her body. Her face at once became bloated. There were visible liquid excretions through the skin. It was as if one were an eyewitness to the suffering and torture that a sinner receives in hell. Many people in the nation felt a glow of sadistic satisfaction in viewing this picture." [407]

Due to his own attempts to save the Rosenbergs, he became a political outcast, as indicated by the following passage:

"As a result of my action in the Rosenberg case I became temporarily a leper whom people avoided, just as later old friends avoided Judge J. Skelly Wright in Louisiana because of his court orders desgregating the public schools. I was dropped from social lists. . . ." [408]

The following passage is also interesting:

> "I know of no more serious danger to our legal system than occurs when ideological trials take place behind the facade of legal trials." [409]

The danger of subjective assessment of character is exemplified by the following:

> "One of my most vivid memories of China came from a prison in which one third of the inmates were there because of "counterrevolutionary" activities. On close analysis it turned out their crime was that they espoused the cause of capitalism. . . . We profess great enlightenment, yet we have a degree of intolerance that puts us on a par with most other people. . . ." [410]

On a lighter note, Douglas writes the following story about his close friend, Jerry Frank who was a Second Circuit, Federal Court of Appeals Judge:

> "Jerry Frank . . . and Learned Hand were sitting on a panel together, hearing cases. The first one was argued by a beautiful as well as brilliant woman who had come up from Washington the day before and had stayed in Jerry's guest room. She and her husband were old, old friends of Jerry. Learned Hand knew nothing about them. . . . So during the course of the argument Jerry whispered to Learned as he pointed to the lady lawyer, "She stayed with me last night." And instantly Jerry and the lady lawyer rose very high in Learned's estimation. . . .
>
> Jerry made a distinguished record on the Court of Appeals; of all the principles for which he stood, one is outstanding, namely the use of the legal concept of "harmless error." It was the practice of the court he served, when "the smell of the case" was strong, to affirm a conviction even though error had been committed at the trial. Jerry Frank, in a long list of dissents . . . pointed out that where the error was substantial and not merely a matter of etiquette, the reviewing court in calling the error "harmless" was in effect giving the defendant a "juryless" trial, for the judge reached the conclusion that guilt had been established "on a record other than that which the jury considered; for the judges are able to and do disregard the improper matter, but it is impossible to know that the jury did." [411]

Jerry Frank once wrote a letter to Douglas, about what a critic said. Douglas wrote Jerry back a letter that read in part as follows:

> "What is good for you may be spinach to me or vice versa. But what the hell? Because you like gin and bitters, is there any reason why I should not get tight on long drinks of Scotch and soda ?" [412]

Douglas was friends with the esteemed Justice Brandeis and admired his statement in the 1928 U.S. Supreme Court, *Olmstead* case which read as follows:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." [413]

Douglas was not however, particularly fond of the Oregon State Bar and tells the following story:

> "To give an example of the wariness a public official must exercise: in 1948 . . . I was invited to Portland to address the Oregon State Bar Association, which put me up at the Benson Hotel. When I checked out of the hotel, I was told that the bill had been taken care of by the association.
>
> . . . Lindsay C. Warren, the Comptroller General of the United States . . . . told me he had learned that I had been a guest of the Oregon Bar Association at the Benson Hotel in Portland, and that the association had not paid the bill but had routed it to a shipbuilding company that had a contract with the U.S. Navy. The contractor had in fact paid the hotel bill.
>
> . . . I phoned the Benson Hotel to get the amount of the bill and immediately sent off a check in payment. I also wrote a letter excorciating the president of the Oregon Bar for doing anything that would link a member of the Court with such a highly unethical practice. . . ." [414]

In his early years on the U.S. Supreme Court, he served with Justice James Clark McReynolds, an ultra-conservative. Douglas tells the following story about McReynolds, which exemplifies how prejudiced the Court was in those days:

> "One day McReynolds went to the barbershop in the Court. Gates, the black barber, put the sheet around his neck and over his lap, and as he was pinning it behind him McReynolds said, "Gates, tell me, where is this nigger university in Washington, D.C.?" Gates removed the white cloth from McReynolds, walked around and faced him, and said in a very calm and dignified manner, "Mr. Justice, I am shocked that any Justice would call a Negro a nigger. There is a Negro college in Washington, D.C. Its name is Howard University and we are very proud of it." McReynolds muttered some kind of an apology and Gates resumed his work in silence." [415]

Douglas was not a fan or supporter of the American Bar Association and writes:

> "I think the explanation lies in the fact that it is apparently the practice of politicians to join all sorts of vote-getting groups or societies. They are our original joiners. Not being a joiner, I do not appreciate the philosophy behind it, for if I ever joined an organization, I would feel committed, as I was with the American Legion and the American Bar Association until I learned their true character. At that point I resigned." [416]

He described U.S. Supreme Court Justice Felix Frankfurter as follows:

> "Frankfurter had a basic weakness. I think he had deep inside him a feeling of inadequacy. He was a man of short stature. Perhaps that was part of it. He longed to be accepted. He was an artist at teasing and taunting the Establishment and its advocates. He loved to see the Dean Achesons of the world squirm. But he also needed to be accepted by them and honored and admired by them." [417]

He described U.S. Supreme Court Justice James F. Byrnes as follows:

> "James F. Byrnes, who served for a year or so beginning in 1941, was a misfit on the Court and was himself the first to admit it. He disliked the Court work, preferring the helter-skelter life on the Hill, where he had served for years, or in the executive branch. His contribution to the Court was gaiety." [418]

He described U.S. Supreme Court Justice Fred Vinson as follows:

> "Vinson was warm-hearted and easygoing. He was a happy party man, enjoying bourbon and branch water. . . ." [419]

He described U.S. Supreme Court Justice Charles Whittaker as indecisive and constantly changing his mind. In one case, Whittaker was assigned to write the opinion for the majority, and Douglas was Dissenting. Whittaker was having trouble writing the majority opinion. Since Douglas knew the case so well, he took the incredible step of offering to help Whittaker write the majority opinion, which Whittaker accepted. The case was *Meyer v. United States*, 364 U.S. 410. Although Douglas did not sign the majority opinion since he was Dissenting, he characterizes it as one of the few cases "in which the majority and minority opinions were written by the same man." [420]

In 1946, Justice Robert Jackson was on a leave of absence from the Court, functioning as U.S. prosecutor at the Nuremburg trials. Chief Justice Stone died and the position of Chief Justice needed to be filled, which Jackson wanted. Jackson believed that Hugo Black had urged President Truman to not appoint him as Chief Justice. Douglas asserts that Black did not. In any event, Jackson sent an excorciating letter to the committee that was considering Fred Vinson's nomination as Chief Justice. In the letter, he sharply criticized Hugo Black. He objected to the fact that two former law partners of Justice Hugo Black had argued cases before the U.S. Supreme Court and that Black did not disqualify himself. Jackson had written a scathing opinion in one of the cases, *Jewell Ridge*. Douglas includes part of Jackson's letter in his autobiography which reads:

> "However innocent the coincidence of these two victories at successive terms by Justice Black's former law partner, I wanted that practice stopped. If it is ever repeated while I am on the bench, I will make my Jewell Ridge opinion look like a letter of recommendation by comparison." [421]

One of the most interesting facts Douglas writes about is how alcohol was regularly served during Court Conferences in the early years. He writes:

> "Prior to 1910, there was a bar in the Conference Room with an attendant who served both soft drinks and hard liquor." [422]

He had no tolerance for the reluctance of Courts to decide difficult issues, writing:

> "If the judiciary . . . puts questions in the "political" rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, the judiciary has become a political instrument itself." [423]

He was generally suspicious of Courts and properly recognized the frailties and vanities of Judges writing:

> "The judicial world can reek with passion and prejudice which only full publicity can crush."[424]

When the other Justices of the Warren Court sought additional law clerks, Douglas teasingly countered with a suggestion to abolish all law clerks. He then made the following comment at Conference:

> "why don't we experiment with doing our own work? You all might like it for a change." [425]

Even U.S. Supreme Court Justices can lose their temper. Douglas tells the following story about Chief Justice Fred Vinson and Justice Felix Frankfurter:

> "One day Frankfurter kept baiting Vinson with barbed taunts. At last Vinson left his chair at the head of the Conference Table, raised his clenched fist and started around the room at Frankfurter, shouting, "No son of a bitch can ever say that to Fred Vinson!" [426]

He tells the following story about when Chief Justice Earl Warren resigned from the American Bar Association:

> "When he resigned from the American Bar Association because he did not believe in some of its policies, the then president of the bar spread the rumor that Warren was dropped from the membership roll because of nonpayment of dues. Warren was furious and went to great pains to correct the record in correspondence with the bar." [427]

Justice Rehnquist once said that Douglas seemed disappointed if the other Justices agreed with him, "because he would therefore be unable to write a stinging dissent." On one occasion, Justice Warren Burger explained at length his reasons to affirm in a case. Douglas responded:

> "Chief, for the reasons you have so well expressed, I vote to reverse." [428]

I close this section on Justice Douglas with one of the most interesting pieces of advice he gave to President Franklin D. Roosevelt, near the end of FDR's career. Douglas and FDR were very close friends and played poker together regularly. They were talking about the type of person that should be appointed to the Supreme Court, although no vacancy existed at the time. Douglas writes about the exchange as follows:

> "I told him that there was nothing in the Constitution requiring him to appoint a lawyer to the Supreme Court. "What?" he exclaimed. "Are you serious?" I answered that I was. He lit a cigarette, leaned back and after a moment's silence said, "Let's find a good layman." . . . There was no vacancy then, and none occurred before FDR died. But a plan had been laid to shake the pillars of tradition and make the Establishment squirm by putting an outstanding, liberal layman on the Court." [429]

NOTE: Presentation of most facts about Justice Douglas' life herein is based on his autobiographies:

1. William O. Douglas, *Go East, Young Man* - The Autobiography of William O. Douglas, (Random House, NY 1974)
2. William O. Douglas, *The Court Years 1939-1975,* The Autobiography of William O. Douglas, (Random House, NY 1980)

U.S. SUPREME COURT JUSTICE OLIVER WENDELL HOLMES

He is regarded as one of the greatest Justices of the U.S. Supreme Court. He was known as the "Great Dissenter." He served on the Court from 1903-1931. He is not one of my favorites. I do not agree with many of his opinions. Many are in fact, quite irrational, particularly in the area of civil rights where his record was horrible. This is a remarkable fact because during his youth he was a fervent supporter of the abolitionists. Alger Hiss, discussed at length in other sections of this book, was one of Holmes' clerks. Holmes definitely, falls squarely into the category of a Justice that would not be able to satisfy the irrational "good moral character" standard of State Bars today.

At the age of seven, he attended a private school. His father was a prominent doctor. One of his report cards in grammar school contained the notation, "talks too much."[430] As a Harvard University student, he described himself to Lucy Hale, a woman he was interested in as, "being of a slightly jealous disposition."[431] In 1861, at age twenty while a student at Harvard he participated actively in antislavery rallies. Shortly thereafter, the Harvard Faculty decided that he should be publicly admonished for "repeated and gross indecorum" and "acts of disrespect" to faculty members.[432] In addition, reference was made to his "oral acts of disrespect."[433] His biographer, G. Edward White writes as follows:

> "Holmes himself was to run afoul of Harvard's disciplinary emphasis. As early as his freshman year, he and a companion were fined a dollar each for "writing on the posts in Tutor Jennisons's room." On three occasions he lost points for "playing," "whispering," or being regularly unprepared for class. After his last examinations had concluded in his sophomore year he was "privately admonished" for "creating a disturbance in the College Yard," and during his senior year he was "publicly admonished" twice, the first for "repeated and gross indecorum in the recitation of Professor <Francis> Bowen," the second for "breaking the windows of a member of the Freshman class." The last two offenses prompted Harvard President Cornelius Felton to write Dr. Holmes about his son, whom Felton characterized as "an excellent young man" but noted that "as of late . . . his conduct has been frequently the subject of complaint."[434]

Shortly thereafter, Holmes joined the army. He fought in the Civil War on the side of the Union. He was seriously wounded three times. He was shot in the chest and in the back of the neck on different occasions. While recuperating, he wrote a letter with the assistance of a young woman, to his parents that read in part as follows, regarding his condition:

> "not yet dead but on the contrary **doing all that an unprincipled son could do** to shock the prejudices of parents & of doctors." [435]

Holmes participated in some of the most violent battles of the Civil War. White writes:

> " "Passion" was as important as "action" in explaining the positive features of a wartime experience. . . .
>
> What seemed to be ennobling about war for Holmes was that it was the end result of "passion," that it was a particularly satisfying release of passion - "action" - and that it was spontaneous, impulsive, and selfless action, action engaged in without any assurance that the actor would find his passion vindicated." [436]

Holmes himself stated:

> "As long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war. . . ." [437]

He also stated:

> "Out of heroism grows faith in the worth of heroism . . . . Therefore I rejoice at every dangerous sport which I see pursued. . . . If once in a while in our rough riding a neck is broken, I regard it, not as a waste, but as a price well paid. . . ." [438]

Personally, I have difficulty subscribing to such viewpoints, and believe them to be irrational. But Holmes isn't my hero, he's the respected hero of the contemporary Judiciary today. After the war, he returned home and lived with his parents. He married Fanny Dixwell in 1872 and both of them lived with his parents.[439] In 1864, he entered Harvard Law School. Five years later he characterized Harvard as follows:

> "for a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts." [440]

Holmes and his wife never had children. Later in his life, he wrote in reference to that decision as follows:

> "I am so far abnormal that I am glad I have no children."[441]

He committed adultery on numerous occasions, and historical evidence suggests his wife was aware of it. His most significant extramarital romance was with a woman named Clare Castletown. He wrote letters to her throughout his life. In a letter to his earlier romantic interest Lucy Hale, Holmes once wrote that he would:

> "like to be on intimate terms with as many women as I can." [442]

In many respects, Holmes concededly had a very pragmatic understanding of life and government as indicated by the following:

> "If a man is on a plank in the deeps sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing." [443]

Ultimately, he taught law at the same school that he had attended and criticized so severely. He became a Harvard Law School faculty member. He then suddenly resigned without notice to accept a position on the Supreme Judicial Court of Massachusetts. The manner of his resignation prompted an intense attack on his "moral character." Professor Thayer of Harvard who was the main instigator, characterized what occurred as follows:

"Holmes accepted the offer . . . and conferred with no one representing the college. . . . the year at the school had only begun; students were here who had been mainly induced to come by his being here, and all the students had rights - as the college had - which he was bound to consider carefully. But he accepted and it was blown abroad at once." [444]

The primary issues were whether Holmes' decision to leave the University to become a Judge was consistent with the terms of his acceptance of the professorship. Most everyone involved, asserted that it was not. By accepting the judgeship and allowing the news to be made public without consulting anyone at Harvard, most everyone felt Holmes was "selfish" and "thoughtless." Harvard was definitely embarrassed by the incident because Holmes left in the middle of the term without any notice. [445] It was suggested that Holmes:

"seems never to have thought and not to know now that it was an . . . indecent action." [446]

The essence of Oliver Wendell Holmes is captured in this historic passage he wrote and which has been quoted repeatedly throughout the twentieth century:

"Only when you have worked alone - when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and despair have trusted to your own unshaken will - then only will you have achieved." [447]

Holmes is considered today as a Great Justice for two reasons. First, his Dissenting opinion in *Lochner v. New York* (1905). The *Lochner* majority invoked a liberty of contract argument to hold legislation unconstitutional that was designed to help non-unionized workers, who were an essentially powerless group at that time. Under the *Lochner* doctrine, social legislation to help disadvantaged individuals was typically held to be unconstitutional. By the mid-1930s, *Lochner* was discredited, in reliance on the Dissenting opinion of Holmes.

The second primary cause for his recognition as a Great Justice was his comparatively liberal application of the First Amendment, and his formulation of what came to be known as the "clear and present" danger test. In very general terms, Holmes formulated the notion that speech was protected by the First Amendment unless the words spoken posed a "clear and present" danger. For instance, shouting "fire" in a movie theater would still be unprotected speech under his doctrine because it posed a "clear and present" danger.

I agree that his opinions in these two subject areas are brilliant. My dislike of him is attributable to his horrible record in civil rights. In *Giles v. Harris*, black citizens were precluded from registering as voters in Alabama. They alleged that the state arbitrarily excluded them by prescribing restrictive qualifications. Holmes concluded that relief could not be granted because even if the black plaintiffs were correct and the entire registration system in Alabama was being fraudulently administered, ordering the system to register black voters would not cure its deficiencies. That in my view, is illogical reasoning.

In *Bailey v. Alabama*, the Court was faced with the legality of a state law that made breach of contract a criminal offense. The effect was to create a system of involuntary servitude, since blacks typically contracted to work on farms. The Court held the state law to be invalid, but Holmes Dissented. It was his view that the state had the right to throw its weight on the side of ensuring that citizens perform on their contracts. The fact that the contracts at issue created a system of involuntary servitude was not sufficiently relevant to him.

He also was a strong supporter of the now totally discredited reasoning of *Plessy v. Ferguson,* that held "separate but equal" accommodations for blacks was constitutional. I find it virtually impossible to reconcile his civil rights opinions, with his strong support of abolitionism.

He also wrote two opinions which are universally recognized as "notorious." One of them is frankly speaking, more ridiculous than anything. The issue of negligence in the case of *Baltimore and Ohio Railroad Co. v. Goodman,* involved determining what responsibilities the driver of an automobile had at a railroad crossing. In that case, a truck driver was hit by an oncoming train. Holmes laid down the now discredited "grade-crossing rule" which was as follows:

> "If a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle. . . ." [448]

Essentially, under Holmes' theory, the railroad company was not liable when a train hits an automobile, because it was the duty of the automobile driver to get out of their car at each railroad crossing to make sure a train was not coming.

The most disturbing case that has consistently troubled those who try to describe Holmes as a champion of civil liberties is *Buck v. Bell*. The State of Virginia sought to sterilize a woman named Carrie Buck, under a state statute that provided for the sterilization of "mental defectives" when the superintendent of state institutions believed "the best interests of the patients and of society" would be served. Her lawyer contended that under "no circumstances could such an order be justified." Holmes wrote the opinion justifying her compulsory sterilization. He wrote as follows:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, **if instead of waiting to execute degenerate offspring** for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. **The principle** that sustains compulsory vaccination **is broad enough to cover cutting the Fallopian tubes.** . . . **Three generations of imbeciles are enough**." [449]

NOTE: The presentation of most facts herein about Justice Oliver W. Holmes life is based on his biography: **G. Edward White,** *Justice Oliver Wendel Holmes - Law and the Inner Self,* (Oxford University Press, 1993)

U.S. SUPREME COURT JUSTICE HUGO BLACK

The First Amendment judicial opinions of Hugo Black are my favorites. Perhaps, even more than the opinions of William O. Douglas. Black and Douglas consistently voted in favor of the Applicants in the Bar admission cases. Typically, Black wrote the opinions and Douglas signed onto them. For the most part, subject to very few exceptions Black was an absolutist when it came to the First Amendment. He did not believe that any balancing was required between the government's interest in restricting speech and the citizen's right to engage in speech. It was his position that the framers of the Constitution did all the balancing required when the First Amendment was written.

His record for enhancing civil liberties as a Justice is probably better than any other Justice who ever served on the Court, with the possible exceptions of Thurgood Marshall and William O. Douglas. This is particularly remarkable because he came from Alabama and early in his career was a member of the Ku Klux Klan. His membership in the KKK was not publicized until immediately after his confirmation as a Supreme Court Justice. Yet, once he was on the Court, he established one of the most impressive records, consistently voting in favor of the civil rights of racial and ethnic minorities.

Dissent was in Hugo's blood. His mother's name was Martha Ardella Toland Black. In the 1700s, Elihu (Hugh) Toland, an ancestor of Black, was sentenced to be beheaded for his activities against the crown, but before the sentence could be executed he fled the country and came to America. Another ancestor, Robert Emmet, also of the Toland family line was hanged in 1803 after participating in the murder of the Irish chief justice.[450] Hugo became acclimated to Dissent, early as a child. In 1901, a high school principal punished his sister for whispering and ordered her to stand in a corner on one leg. Hugo told the teacher to let her go home. The following then transpired:

> "The professor then announced he was going to "whip" Hugo. Hugo was in his seat when Turnipseed came over with a switch and started to hit him. Hugo grabbed it and broke it into pieces. . . . Turnipseed asked Professor Yarbrough, his co-principal, to bring another switch and to hold Hugo. Both of them tried to whip Hugo, but he broke all their switches. . . . After the family talked it over, Hugo never again attended Ashland. . .. It was his first questioning of authority, his first dissent, his first experience acting as a defense lawyer, protecting himself and his sister from unjust punishment, and he met it with defiance." [451]

After the above episode, Hugo left school. He was a high school dropout at age sixteen. In 1903, he took a statewide test to become a teacher, but failed it. He then entered Birmingham Medical College, but decided he was not interested in medicine and dropped out of there also. In 1904, with an obviously scattered academic record and no degree, he entered the University of Alabama Law School. The Law School's admission requirements at that time required a person to be either a college graduate; or alternatively pass an examination in English and History. Hugo did neither. His biographer, Roger K. Newman writes:

> "As Hugo had not been graduated from any institution nor taken any examination, he was apparently admitted in violation of the regulations." [452]

He developed a reputation as a tough lawyer. One day a woman walked into his office and his partner asked if he could help her. She responded:

> "No, not you," . . . I want the mean-looking one." [453]

In 1911, he became a Birmingham, Alabama trial court judge. A drunk, old black man was brought into his Court for violating liquor laws. Hugo fined him $ 2 which the drunk did not have, and so Hugo loaned him the money. When the drunk was brought in a second time, Hugo did the same thing, fining him and then loaning him the money to pay the fine. On the third occasion, Hugo sentenced him to a short period in jail.[454] He left the bench in 1912 and returned to private practice. In 1914, he was elected as a prosecutor. In 1917, he volunteered for the army and in 1921, at age 32, he married Josephine Foster who was 19 years old, thirteen years his junior. [455] He then went back into the private practice of law, practicing almost exclusively in the personal injury field. His abilities were described as follows:

> "In the courtroom he was nearly unbeatable. Hugo had a way with juries, Cocky, sure that he could persuade any juror, he was satisfied only if he won 90 percent of his cases. He bluffed and gambled, making jurors think that there was much information on the sometimes blank paper he waved in front of them. . . .
>
> To Hugo the courtroom was virtually his. . . . "That's my turf," he once said. . . .
> . . .
> "During trial, he was usually feisty and contentious. He deliberately skirted the limits, provoking foes and infuriating judges who often threatened to, but never did, charge him with contempt of court. ("If you're not threatened at least once during a case, you're not doing your job," he said.)" [456]

He then became a member of the KKK, which is obviously incongruent with his exemplary record supporting civil liberties as a U.S. Supreme Court justice. He joined the KKK on September 13, 1923, took the Klan oath and shared its political platform and ideology. No reasonable assertion can be made that he had illusions about the group he was joining. He knew exactly what it was and deliberated for over a year before deciding to join. He was active in the organization, marched in parades, and dressed in full costume including hood and mask.

The most that can be said for the matter is that he ultimately resigned, and subsequently was viewed by the organization as a traitor for his later contributions to furthering the civil rights of minorities and eliminating prejudice. It is nevertheless, nothing short of absolutely incredible that one of the greatest civil rights champions of the U.S. Supreme Court was at one time an active member of the KKK.

His membership in the KKK became his skeleton in the closet. He tried to never talk about it, possibly suffering from a guilty conscience, and always came up with some different type of lame excuse to explain away his membership. Certainly, he failed to provide "full disclosure" on the matter. At varying times, he explained that he joined because his old law partner convinced him, he wanted to get the Klan recruiter off of his back, and that it was not in those days what it became later. His explanations all lacked creditability, and there is little doubt that he knew exactly what he was doing. He resigned from the KKK in 1926, approximately three years after joining and just before he began campaigning to become a U.S. Senator. The KKK supported his candidacy and helped him get elected. Even throughout the early 1930s, he continued to retain his prejudicial attitudes.

As a U.S. Senator in the early 1930s, Hugo led a committee investigating lobbying. His investigative tactics were ruthless. Comments were made that the Black Committee had "virtually set up a grand inquest on Capitol Hill," [457] engaged in unconstitutional searches and seizures, [458] and unjustly intruded on the privacy of citizens. Quite a far leap from the Hugo Black that would later condemn investigative tactics by State Bars. He attempted to justify his committee's conduct stating:

> "The power of the probe . . . is one of the most powerful weapons in the hands of people to refrain the activities of powerful groups who can defy every other power. That is because special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity." [459]

He also asserted that after an investigator:

> "has tried every technique, politeness, kindness, blandishment, . . . he is sometimes driven in the presence of a witness who is deliberately concealing the facts to attempt to shake it out of him with a more drastic attack." [460]

His biographer, Randall Newman writes:

> "Black's hatred of business interests caused him to trample over witness's rights protected by the Fourth Amendment."[461]

As a father of three children, he was tyrannical. It was his hope that by continually discouraging his sons he would stimulate them. He did not reward them when they did well, but punished them when they did bad. He banned them from reading the comics in the newspapers. One of his sons, Sterling Black as a child, after getting a perfect report card in school felt the ban on reading comics shouldn't apply to him. The following transpired:

> "So, early the next morning Sterling called a friend and they just started to walk. But by night they had become tired and the friend called his father to pick them up. When Sterling came home, neither Hugo nor Josephine said anything or asked why he had run away. Hugo immediately locked Sterling in the attic for several days of solitary confinement, and warned the rest of the family not to see him."[462]

In 1935, an anti-lynching bill was introduced in the U.S. Senate that called for federal prosecution of any public official, if a mob tried to injure or kill a person in its custody. Hugo voted against it, although ostensibly he said that he favored the bill's objective. By 1936, his main role was assisting FDR with passage of New Deal legislation and having it upheld by the U.S. Supreme Court. The Court at that time was invalidating most of FDR's New Deal.

He began reading extensively about the history of the Court to find its' point of vulnerability. The ultimate result of his efforts was known as the Court-packing plan. The intent was to leverage the U.S. Supreme Court into rendering rulings on behalf of the President's legislation, by threatening to dilute the Court's authority by adding additional members to the Court. The plan succeeded to the extent that from that point forward, the Court validated FDR's New Deal. The U.S. Supreme Court had been leveraged. Hugo's study of the Court had the effect of beginning to change his ideology. He stated:

> "I regret to say that a real study of impartial history has changed a great many of my preconceived ideas about the aloofness of the Supreme Court on political issues. In my judgment, it has simply not been "aloof." On deciding these political interpretations they have always followed the economic predilections of the individual members. Nothing is clearer than this." [463]

In 1937, FDR repaid Hugo's support by nominating him to be a U.S. Supreme Court Justice. From the moment his nomination was announced, his connection with the KKK became a "quiet" topic of conversation in the Senate. [464] No one however, could find concrete proof of his membership. It wasn't until he was sworn in as a Justice that the proof was found and the story went public. When his membership became publicly known, senators and congressman publicly demanded that he resign.

His house was picketed and the public was outraged. The nation was in a virtual uproar. In October, 1937, Justice Hugo Black addressed the nation on radio about the KKK issue. All three networks carried his speech. His audience of forty million was the largest ever, except for that which heard King Edward VIII abdicate the throne the year before. [465] Prior to his radio address, in a conversation with James Roosevelt, Black admitted that he had joined the KKK, stated that he had resigned, repudiated it, characterized his membership as a mistake and asserted that he owed no allegiance to them.[466] The KKK became furious in future years with Hugo for disavowing them.

Hugo Black quickly became a different man. His support from the State of Alabama was gone, and he consistently ruled against Alabama while on the Court. The people of Alabama felt they had been betrayed by him. Hugo on the other hand, felt he had to prove to the nation that he did not subscribe to KKK ideology. He proved such in his judicial opinions. He became a champion of civil liberties. Like so many others who won their fame as "Inquisitors" (McCarthy and Nixon) only to ultimately have similar investigative techniques used to uncover their own "moral character" flaws, Hugo Black became the strongest critic of unconstitutional investigations. He was now the Protector of the constitutional rights of those being investigated. He went from one end of the spectrum, all the way to the other.

He was undoubtedly a great politician. Faced with the public clamor over his KKK membership, the first thing he did upon taking office was to hire a Catholic secretary, a Jewish clerk, and a Black messenger. In 1951, his wife Josephine died at the age of 52. In 1956, his secretary retired and he needed to find a new one. A woman named Elizabeth DeMeritte was recommended to him. Hugo's biographer describes the situation as follows:

> "One possible problem gave the justice pause : Elizabeth was separating from her husband. "I don't want a woman with middle-age problems on my hands." But Daddy, she's so good-looking," Hugo Jr., replied. "Send her up," Black said." [467]

Approximately, one year later Justice Hugo Black married his new secretary. He was 71, and she was 49. What is the proper assessment of Hugo Black? He was certainly a man whose life had astounding contradictions. He was a member of the KKK, but did more for civil liberties than perhaps any Justice on the Court other than Thurgood Marshall and William O. Douglas. He was a strict, moralistic disciplinarian with his children, but ultimately married his secretary who was 22 years younger. His first wife was 13 years younger. He engaged in ruthless investigative techniques as a Senator, but later condemned the use of such tactics in his judicial opinions. He was the ultimate Dissenter, and the ultimate politician.

Stated simply, he was a Judge. And Judges have "moral character" flaws. Every one of them has engaged in conduct that could result in denying their admission to the State Bar. So, it's time they get off their pompous high-horse. Hugo Black succeeded in doing so.

NOTE: The presentation of most facts herein about Justice Hugo Black's life is based on his biography: **Roger K. Newman**, *Hugo Black - A Biography,* (Fordham University Press, 1997)

U.S. SUPREME COURT JUSTICE STEPHEN FIELD

One day Hollywood producers have to make a movie about Justice Stephen Field. I'm not sure whether he should more properly be called a Supreme Court Justice or a Cowboy. He was either a hero or a criminal depending on who you ask. I suspect that he was a bit of both. He served on the Court during the 1800s and wrote one of the most famous U.S. Supreme Court opinions ever, that of *Ex Parte Garland*. It's a case the State Bars just can't get rid of, no matter how hard they try. It established conclusively in no uncertain terms that the ability for a qualified individual to engage in the practice of law was a "right," rather than a "privilege." The case has survived almost 150 years and is still cited today. The following story captures the essence of Stephen Field perfectly:

> "In June 1850 the new district court judge, William R. Turner, replaced Field as the highest judicial authority in Marysville, and it was not long before the two men clashed. On June 7, while representing John Sutter in Turner's court, Field said something that obviously irritated the new judge. It irked him so much, in fact, that he held Field in contempt of court, ordered him to be confined for forty-eight hours, and fined him $ 500. . . . Field claimed that Turner, a southerner, was prejudiced against him because he was from New York. For his part, Turner claimed that Field had been disrespectful in court, a charge that is not altogether unbelievable . . . .
>
> . . . Field petitioned the county court for a writ of habeas corpus. . . . Technically, the county court's jurisdiction was inferior to that of Judge Turner's district court. Nevertheless, county court Judge H.P. Haun granted the petition and ordered Field released. . . . Field celebrated by buying drinks and cigars for a crowd that had gathered to observe what was going on. . . . Field claimed the crowd acted spontaneously after Turner had gone from saloon to saloon threatening Field and his friends and calling them "perjured Scoundrels." Turner claimed that Field incited the mob, exhorting them to throw the district judge into the Yuba River. . . .
>
> Whatever actually happened, the following Monday Turner responded by holding Judge Haun in contempt and ordering Field . . . disbarred. When the sheriff and twenty armed men arrived in the county court to carry out Turner's order, Judge Haun expelled the posse from the courtroom and fined the sheriff $ 200 for contempt. Later, Field was locked up and Haun quietly paid his fine, but the matter of disbarment remained. Acting for himself and two other attorneys, Field appealed to the state supreme court, which ruled in Field's favor, ordering that he . . . be reinstated to the bar. Turner first complied . . . by reinstating Field . . . but then he disbarred Field once again. Field again appealed to the supreme court, and again it ruled in his favor." [468]

In view of his own personal history, it's easy to see why he would feel strongly about the ability to practice law being a "Right." He had personally experienced the manner in which subjective judicial vindictiveness based on a personality clash, and "attitude" could be used to assert that one's conduct was "immoral," and purportedly justified revocation of their law license. Another story about him during his early years was as follows:

> "Then the Justice said: he would not allow such language by the Counsel – and would Himself protect the Jury, and, doing what I never saw before – drew from his breast pocket an eight-inch Bowie knife, placed its back between his teeth, and from his Holster drew a Navy Colts revolver, cocked it, and placing its muzzle within six inches of the offending Counsels head – Hissed at him the command "Eat those words, or Dam you, I'll send you to Hell." The Counsel meekly said "I eat," and the pistols were returned to their holsters. . . .

That justice of the peace . . . was Stephen J. Field, late . . . Justice of the Supreme Court of the United States." [469]

Field did not respond particularly well to criticism as indicated by the following which occurred while he served on the U.S. Supreme Court:

"Recounting the contents of the article, he expressed dismay at its "bitter and malicious spirit." Field speculated that the correspondent must have been bribed by rivals or was "some old enemy whom I have probably given a just judgment." Then he requested his brother take action.

> "I wish you would call upon the editor of the Herald and ask him to give you the name of the writer of the article in question. My impression is that the writer is a miserable scalawag in California and, if I am correct, it would be a very easy thing for me to have his political head decapitated or his political nose sufficiently pulled to make him hereafter politically silent."

". . . Demanding "personal satisfaction" and warning that he "would not be trifled with" Field again demanded to know the writer's identity. "I say to you that if they do not give me the name of the man who wrote that article it will be the saddest day for Mr. Bennett <of the Herald> that ever has been in his life, and those very men who refuse will before the month goes around, regret it bitterly."[470]

Field also has the notable distinction of being the only "tenth" justice to ever serve on the U.S. Supreme Court. On March 6, 1863 Congress enlarged the U.S. Supreme Court to ten seats and Field was appointed by President Lincoln to fill the tenth seat. The Court would have ten justices for the short period of 1863 - 1869, when it returned to having nine seats. [471]

Field is a good example of how the same Judges that continually stress the importance of complying with the rule of law are often the Judges who violate it. Early in 1862, Field was Chief Justice of the California Supreme Court. The losing attorney in a litigation filed a motion for writ of error which would start an appeal to the U.S. Supreme Court. The motion was granted and the California Supreme Court was Ordered to send its files up for review. Field refused to comply with the Order and held that the Supreme Court of California does not recognize an unlimited right of appeal to the Supreme Court of the United States. [472] Yet, unsurprisingly, once he became a U.S. Supreme Court Justice, he was very protective of federal power and consistently held that State Supreme Courts were unlawfully acting beyond their authority.

Then, of course there is the Terry incident involving Field. A story that is absolutely amazing. Justice Field's bodyguard shot and killed David Terry, a former Justice of the California Supreme Court. Terry and Field had served together on the California Supreme Court and did not get along, to put it mildly. Subsequently, Terry represented and then married Sarah Althea, rumored to have been a prostitute. Terry represented her in a lawsuit against former U.S. Senator William Sharon. Sarah contended that Sharon had kept her as a mistress (prior to her marriage with Terry) and had contracted to marry her. The California Court ruled in her favor.

Senator Sharon then took the case to federal court where Judge Sawyer ruled in his favor. Sarah in response physically attacked Judge Sawyer. Field took the case over from Judge Sawyer and also ruled in Sharon's favor. Sarah then started yelling in the courtroom that Field had been bribed and Field ordered her to be removed from the courtroom. Sarah proceeded to slap the Marshal in the face, which caused former California Supreme Court Justice David Terry (now married to Sarah) to act. Terry was

66 years old and told the Marshal, “Don’t touch my wife.” The Marshall did not relent and Terry punched him in the face. Judge Field then sentenced Terry to six months in jail for contempt and his wife to three months. Terry served the entire sentence.

After their release from jail, the Terrys found themselves on a train with Stephen Field. What happened next has been the subject of bitter dispute. Field and his bodyguard said that when Terry noticed Field, he struck Field with a violent blow to the face. A witness, F.J. Lincoln swore that Terry merely brushed Field with an open hand as if to insult him. Whatever really happened, Field’s bodyguard David Neagle took immediate action and shot Terry twice, killing him. Neagle swore that he thought Terry was reaching for a knife, but no knife was ever found.

Terry had been a powerful man with many friends in California. It was publicized that he had been murdered and an inquiry was held. The sheriff served an arrest warrant on Field, who submitted to the arrest. Ultimately the charges against him were dismissed, along with the charges against his bodyguard. The Terry incident ultimately established the doctrine of immunity from prosecution for federal officials carrying out their official duties, as the charges against Neagle were ultimately heard by the U.S. Supreme Court. [473]

Justice Stephen Field of the United States Supreme Court. Disbarred twice, arrested for murder and a U.S. Supreme Court Justice. I can only imagine how they would have treated an NCBE character questionnaire that he would have submitted in today’s world. No wonder the State Bars don’t like the case of *Ex parte Garland*, that he wrote the lead opinion on. One thing is certain. It would be an incredible experience to listen to former U.S. Supreme Court Justice Stephen Field at a State Bar admissions interview today.

NOTE: The presentation of most facts herein about Justice Stephen Field's life is based on his biography: **Paul Kens**, *Justice Stephen Field - Shaping Liberty from the Gold Rush to the Gilded Age,* (University Press of Kansas, 1997)

U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL

He was the great-grandson of a slave and the grandson of a Union soldier. He was perhaps the greatest civil rights attorney this nation has ever produced and became the first black Justice of the U.S. Supreme Court. His appointment to the Court was particularly interesting because he was the first Marylander to sit on the Court since Chief Justice Roger B. Taney, who 110 years earlier wrote the Court's opinion in the *Dred Scott* case which held that black Americans had no constitutional rights and slavery was constitutional.

Along with Justices Earl Warren, Hugo Black, William O. Douglas and William Brennan, Marshall led America during the 1960s and early 1970s in the civil rights cause. By the late 1980s and early 1990s, at the end of his career, his opinions were no longer in the majority and he regularly Dissented. The Court had become more conservative and Marshall saw a great deal of the work he dedicated his life to, erased, as the Warren Court decisions were diluted. He tried to stay on the bench as long as possible so that his seat would not be given up to a more conservative Justice and he was not at all happy with the Court when he finally retired. In 1988, he told a group of judges and lawyers who questioned him about the Supreme Court's increasingly conservative composition:

"Don't worry, I am going to outlive those bastards." [474]

From the earliest years of his childhood, Marshall coupled his strong sense of justice with a personality and attitude that was high-spirited, fun-loving, and smart-alecky. As a grammar school student:

> "His elementary school principal would send recalcitrant students to the school's basement with a copy of the Constitution and orders to memorize a passage before returning to the classroom. Thurgood spent many hours in the basement. "Before I left that school," he later told a reporter, "I knew the entire Constitution by heart." [475]

When he was a little child, he asked his father what the word "nigger" meant. His father responded that if anyone ever called him that, Thurgood not only had permission to fight the person, but was under "orders" to fight him. It was an order that Thurgood followed physically and legally for the rest of his life. In 1922, when he was a 14 year-old high school student, a white man called him, "Nigger." Marshall described what he did next as follows:

"I tore into him." [476]

In his sophomore year of college, Marshall and fellow students participated in the hazing of freshmen. One night they descended on the freshman dormitory and shaved the heads of most of the underclassmen. [477] The school's administration charged them with the incident. They were suspended for two weeks and collectively fined $ 125. In 1929, he married Vivian Burey, a University of Pennsylvania graduate who he described as a "cute chick." [478]

The marriage brought a conclusion to his days of campus carousing. They were married for 25 years until her death from cancer in 1955. She had four miscarriages and they had no children. Socially, the Marshalls enjoyed the night life. They frequented Harlem nightclubs and after-hours jazz clubs. He also loved to gamble at the race-track and ultimately became a pretty good handicapper. Eleven months after Vivian's death, he remarried and ultimately did have children with his second wife.

He was a champion of the poor, minorities and those unempowered in society. At his last press conference after announcing his retirement, when asked what major tasks the Supreme Court faced in the years ahead, Marshall replied:

"To get along without me." [479]

His discontent with the Court when he retired was exemplified by his final Dissenting opinion, in which he wrote:

"Power, not reason, is the new currency of this court's decision making. . . ." [480]

His pinnacle of influence was during the Warren Court years. One of the most interesting stories concerned the Supreme Court's growing docket of pornography cases. In order to determine whether a movie was obscene, the Justices at that time would view the movies. Each week they gathered in a basement room to watch the adult movies they were called upon to review. It became irreverently known as "Dirty Movie Day."

Marshall would regularly make loud wisecracks during the viewing, especially if he had a few drinks at lunch which was not unusual. He would sometimes comically request a copy of the movie, to show his children when they reached college age. [481] The most interesting aspect of this is that the one other Justice, who seemed to particularly enjoy "Dirty Movie Day" was John Harlan. Harlan would also joke about the movies. Unlike Thurgood, however, Harlan was a conservative Justice. He was known as the Great Dissenter of the Warren Court. It is interesting that of the two Justices with the most interest in "Dirty Movie Day," one was a liberal and the other a conservative. Black and Douglas, incidentally never attended "Dirty Movie Day."

Marshall and Douglas had several personality clashes on the Court and did not get along at all. This might seem surprising because their civil liberty opinions are very similar. They were both champions of the poor. The best explanation is that they both had such strong personalities, a clash was inevitable. Douglas was closest friends with Hugo Black. Marshall's closest friend was William Brennan. Douglas got along with Harlan, even though they opposed each other in virtually every civil liberties case. Marshall ultimately got along with Warren Burger although their opinions also opposed each other consistently. Clearly, whether the legal opinions and ideology of two U.S. Supreme Court Justices are in agreement, is not determinative of whether they get along personally.

In the early 1970s, after Earl Warren retired, and the conservative Warren Burger was appointed to take his place as Chief Justice, Justice Marshall enjoyed putting Burger ill at ease with black street-corner colloquialisms. He would customarily greet Burger by saying:

"What's shaking, Chiefy baby ?" [482]

The conservative Burger at first returned the greeting with a puzzled look, as if he had no idea what Marshall was saying. There is little doubt that Marshall did it purposely to rattle him. The two did however ultimately develop a cordial relationship.

Marshall graduated first in his class from Howard law school in 1933, and in 1935 scored his first major civil rights victory which was a case of sweet revenge. He won a suit to integrate the University of Maryland law school which years earlier had rejected his own application because of race. In *Murray v. Pearson*, Marshall represented Donald Gaines Murray, an Amherst graduate who upon filing an application for admission to the University of Maryland law school received the following letter in response:

"President Pearson has instructed me today to return to you the application form and the money order, as the University does not accept Negro students. . . ." [483]

Marshall won. When he retired in 1991, he was asked during a press conference about the University of Maryland case which was his first great victory. Reflecting back upon his own denial of admission from that law school, Marshall responded:

"It was sweet revenge, and I enjoyed it to no end," [484]

In the 1940s, he called travel agencies to uncover whether their booking practices were discriminatory. On one occasion, he was surprised when a travel agent agreed to reserve a room for him in a Florida hotel. He then asked, "Excuse me, is this hotel restricted ?" The travel agent replied, "Oh, Mr. Marshall, I didn't know you were Jewish!" Marshall then feigned a heavy black dialect and responded, "Ahh, sister, have I got news for you!" [485]

He ultimately became counsel for the NAACP and in 1954 won the historic case of *Brown v. Board of Education* that struck down segregation in public education which he argued before the U.S. Supreme Court. In 1962, he was appointed by President Kennedy to be a Second Circuit Federal Court of Appeals Justice. In 1965, President Johnson appointed him to be Solicitor General for the United States. He caught some bad press for having a reputation as a heavy drinker who polished off three cocktails at lunch, which he diffused by freely admitting and joking about it. He was never particularly concerned about his telephone being wiretapped, although he thought it was and joked that:

"All they would have heard was me cussing and my wife gossiping." [486]

Thurgood Marshall did everything he possibly could to bring equality to America both as an attorney and U.S. Supreme Court Justice. He was a champion of the underdog and all races. He dedicated his life to helping others. He was smart, tough, eloquent and brave. At the same time he was emotional and a lot of fun to be with. He always had jokes to tell and was very affable. He loved women, booze, gambling, partying and used profanity often. He got in trouble many times during his own life, particularly during his youth. He was also a true American hero, with an incredibly strong sense of justice and accomplished great things for this nation.

Yet, in today's world, he easily could be denied admission to the State Bar due to the arbitrary manner in which the irrational "good moral character" standard is applied. In many respects, it's the same reason he was denied admission to the University of Maryland law school. And he made them change.

I definitely would have considered it to be an honor to party with Thurgood Marshall.

NOTE: The presentation of most facts herein about Justice Thurgood Marshall's life is based on his biography: **Michael D. Davis and Hunter R. Clark**, *Thurgood Marshall - Warrior at the Bar, Rebel on the Bench*, (A Citadel Press Book Published by Carol Publishing Group, 1994)

U.S. SUPREME COURT JUSTICE JOHN MARSHALL HARLAN

Sometimes I just don't know what to do with John Marshall Harlan. He was known as the Great Dissenter of the Warren Court. It is important to remember that being a Dissenter on the Warren Court, meant that he was a conservative. Typically, Dissenters are viewed as liberals, but the Warren Court was liberal and therefore the Dissenters occupied the unusual role of being conservative.

In many respects, the State Bar admissions debacle which is the central thesis of this book is entirely Harlan's fault. He wrote virtually every major opinion ruling in favor of the State Bar. He was the absolute antithesis of Justices Black, Douglas and Marshall who consistently ruled in favor of the Applicants. If Harlan had voted differently, the irrational nature of State Bar character inquiries would no longer exist today.

Yet, by the same token I must concede there are aspects of his personality that I like immensely. He was certainly very bright and a good writer. At the end of his career, he was also beginning to see the other side of the State Bar admissions problem as pointed out in the section of this book dealing with the 1971 cases of *Stolar, Baird* and *Wadmond*. I honestly believe that if Harlan had remained on the Court for a few more years, he would have changed his vote.

Harlan's Grandfather, the first John Marshall Harlan also served on the U.S. Supreme Court and also had a reputation as a Dissenter. In fact, the first Harlan, arguably wrote the most significant Dissent in the history of the United States Supreme Court. He was the lone Dissenter in *Plessy v. Ferguson* in 1896, where the majority held that separate but equal accommodations for blacks was constitutional. It would take more than 50 years for the U.S. Supreme Court to overrule its' holding in *Plessy*, when it determined that segregation was unconstitutional in *Brown v. Board of Education*. Harlan II however, was nothing like his Grandfather. Based on his own voting record, he seems to have regretted his Grandfather's courageous lone dissent in *Plessy*. The first Harlan was a liberal. The second Harlan was a conservative.

With a Grandfather who was a U.S. Supreme Court Justice, Harlan grew up in a world of societal privilege. He was a Rhodes Scholar and attended Princeton University. He became a U.S. attorney during the Prohibition era and was named to head the office's Prohibition division. This was somewhat remarkable because he was quite skeptical from the start about the legitimacy of Prohibition. His sister Edith stated:

> "He thought it was ridiculous. . . . We all did. Here we were making gin in our own bathtubs. I made some myself lots of times. We all had our own bootleggers." [487]

When Edith graduated from Vassar, Harlan asked her what she would like as a graduation gift. When she asked for a bottle of scotch, he obliged. Edith and her friends proceeded to drink the entire quart after which she recalled they made a terrible scene at the class supper. [488] In 1928, Harlan married a divorced woman, Ethel Andrews. Although he grew up with societal privilege, it was clear that he was no prude. He liked booze and married a divorced woman during a period when society frowned greatly on such a marriage.

His father, John Maynard Harlan was never a Judge and brought scandal upon the family. John Maynard and his brother Richard were not adept at managing money. They lost a tremendous amount and in a desperate attempt to cover it up, falsified accounting records. Ultimately, the scheme fell apart and resulted in protracted litigation over many years between Harlan's father and his uncles. Harlan himself, does not seem to have been involved. [489]

In 1930, after leaving the U.S. attorney's office and resuming private practice, Harlan assisted Emory Buckner in defending heavyweight boxer Gene Tunney. A Bronx speakeasy operator was the best possible witness for them. Harlan later recalled :

"days drinking with him before he agreed to testify." [490]

In 1940, he represented British scholar Bertrand Russell. Russell was imprisoned in 1918 for four and a half months for seditious writings. He had a reputation as a great philosopher, but also led an unorthodox personal life. He was allegedly involved in several adulterous relationships. Russell was offered a professorship at City College by the Board of Education. In response, a civil suit was instituted against the Board challenging Russell's appointment on moral character grounds. Specifically, it addressed his "notorious immoral and salacious writings."

The trial court judge ruled against Russell. Harlan represented the Board, (on behalf of Russell) at the appeals court. He asserted that the trial court's conclusion was arbitrary and capricious. He lost the case.

The issues involved were remarkably similar to those in State Bar admission cases. Louis Lusky who was a co-member of Harlan's law firm later recalled that when Harlan lost the case, it was the only time he ever saw Harlan "really angry." [491] This was quite a far leap from the Harlan that years later would himself write such opinions. In 1949, he and an associate functioned as a subcommittee for the New York City Bar Association. They reviewed the credentials of a woman candidate for a federal district judgeship and concluded that:

> "If the appointing power is determined to fill one of the vacancies . . . by appointment of a woman judge" she was "**better qualified than any other woman**. . . . " [492]

In 1961, as a U.S. Supreme Court Justice, he wrote for the Court in upholding a Florida law that exempted women from jury service, stating:

"woman is still regarded as the center of home and family life." [493]

From 1948-1950, he was Vice-President of the American Bar Association. Their political support became the fulcrum of his career, and probably explains why he became so deferential to abusive State Bar investigative tactics. In October, 1954 Justice Robert Jackson died and President Eisenhower nominated Harlan to fill the vacancy. On November 12, 1954, Harlan wrote Justice Burton requesting a briefing on cases pending on the Court so that he would be able to begin promptly if his nomination was confirmed. Burton shared the note with Chief Justice Warren. Warren wrote Harlan a letter back, after speaking with the other Justices. The letter was designed to provide Harlan with the advice of the other Justices, concerning the questions that would be posed to Harlan by the Judiciary committee as part of the confirmation process. It read in part:

> "Most of them were of the opinion that if they were in your place, **they would not answer** questions relative to their views on the Constitution, statutes or legislation. Two of the Justices stated they would answer very general questions in this field but nothing that was specific. It seems to me that if the Committee attempted to probe your mind on legal matters, it would be for a definite purpose and they would not be satisfied with general questions and answers. . . ."[494]

At the confirmation hearings, concern was expressed about Harlan's membership in the "Atlantic Union." The concern was that the organization's goals would contribute to a relinquishment of American control by supporting a union between England and America. In January, 1955, Harlan wrote a letter indicating that he planned to resign from the Atlantic Union if his nomination was confirmed. He assured the secretary of the Atlantic Union that he had "no apologies to make for his membership in the Union." At the confirmation hearings however, he emphasized the limited, pro forma character of his association with the Union and professed scant knowledge of its' goals. He stated:

> "I do not think I even paid my dues. I attended no meetings of the committee. . . . I have never spoken on behalf of the committee, nor have I discussed the affairs with anybody even informally. If you want me to be completely frank about my relationship to it, until this matter came up in connection with my nomination, I am afraid that if anybody had asked me if I was a member of the Atlantic Union Committee **I might have been mistaken in saying "No.""** [495]

Mississippi Senator Thomas Eastland, who was Harlan's fiercest interrogator during the confirmation hearings opposed his nomination on grounds that included:

> "The **character and nature of his evasive answers** lends weight to the conclusion that he sides with those who would forfeit our sovereignty." [496]

Eastland also stated:

> "Mr. President, here is an able lawyer, a man who represented the DuPonts in a great antitrust case, a man who was on the bench of the circuit court of appeals. . . . **He stated that he did not know what the Bricker amendment was. . . . It seems peculiar to me that that fact did not trickle down to this nominee.** . . ." [497]

Harlan refused to answer numerous other questions of the committee and was the subject of substantial criticism for his refusal. Many of his answers were evasive and his disclosures incomplete. Apparently, this obvious hypocrisy did not bother him when he later wrote State Bar admission opinions. By then he had been confirmed. Harlan wrote Felix Frankfurter a letter about the confirmation process characterizing it as an:

> "experience - one that should never have been associated with a nomination to that great Court." [498]

In the mid 1960s, Harlan's household cook, Leanna Mitchell was being pressed by the Internal Revenue Service for unpaid taxes. Harlan violated judicial ethics by writing a lengthy letter to the IRS on her behalf explaining that she was making monthly payments under a prior agreement with the agency. Mrs. Mitchell then took the letter with her to an interview that she had scheduled with an IRS official. As a result of Harlan's unethical intervention (which reflects adversely on his "moral character") the prior agreement was allowed to stand. [499]

As indicated previously herein, the U.S. Supreme Court in the 1960s had a growing docket of pornography cases. In order to determine whether a movie was obscene, the Justices at that time would view the movies. Each week they gathered in a basement room to watch the adult movies they were

called upon to review, on what was known as "Dirty Movie Day." At one time, Harlan was responsible for scheduling the screenings. In his memo announcing the viewing for "Language of Love" he noted comically that "No tickets are required." When he missed a screening, he enjoyed probing his embarrassed clerks for detailed description of the film at issue. About every five minutes when watching one of the porno flicks he was known to exclaim, "By George, extraordinary!" [500]

In 1967, the U.S. Supreme Court extended the protection of the Fourth Amendment to government eavesdropping, which was running rampant throughout the 1960s. Harlan received a letter from Chief Justice William Duckworth of the Georgia Supreme Court. Duckworth was irrationally angry about the Supreme Court's decision. Duckworth's letter to Harlan stated disrespectfully:

> "By such nearsighted decision. . . . you victimize the innocent public and force them to endure crime. . . . (Judges) willing to assault the bed-rock of our liberties which is our government on **the flimsy pretense that the Constitution requires it** . . . should resign . . . . " [501]

Overall, Harlan was a disappointment. He consistently ruled against the underprivileged. His career on the Supreme Court for the most part is reflective of the societal privilege that he was able to enjoy as a youth. Unlike Douglas, Marshall and Black he lacked the ability to identify with the feeling of hopelessness and despair that economically disadvantaged citizens endure. Arguably, but by no means certainly, it could be asserted that he simply lacked compassion. His own life was certainly filled with numerous so-called "moral character" flaws. He was a bright man, but he dropped the ball.

One thing is certain. The moral character review process that he condoned and supported could have resulted in denial of his own admission to the State Bar. But, he was lucky enough to have the arbitrary nature of the process function in his favor.

NOTE: The presentation of most facts herein about Justice John M. Harlan's life is based on his biography:

Tinsley E. Yarbrough, *John Marshall Harlan - Great Dissenter on the Warren Court,*

(Oxford University Press, New York 1992)

U.S. SUPREME COURT JUSTICE LEWIS F. POWELL, JR.

Louis Powell proved that people can change. When he assumed his seat on the Court, he was a staunch conservative. When he left the Court, he was every liberal's favorite conservative. He grew up in Virginia in the early 1900s, when racism was running rampant. His family had black servants. He attended all-white schools and never met a black as an equal.

As a child, he had difficulty getting along with other kids at school His biographer, John C. Jeffries tells the following story of his grammar school years:

> "At recess the first day, the other boys demanded Lewis's lunch and gave him a "hell of a beating" when he refused. For the next two days he stayed in the classroom with the teacher but soon realized that "if I didn't go out and brave the other boys, I would be a sissy." Lewis faced his tormentors and was accepted at his new school, but he never fit in with the rowdy working-class style of south Richmond.
>
> Lewis Jr. was not the rough-and-tumble sort. He was a thin child, . . . with a head almost too large for his body and ears that stuck out so sharply that for a time he tried taping them flat when he slept. Well-mannered and quiet, he excelled at his studies." [502]

On his twenty-first birthday, his father wrote to him:

> "never in your life have you given me one moment's worry or concern." [503]

His younger sister, Zoe was another story. She was a flamboyant party girl, who wore spike heels and dyed her hair. She was considered a "law unto herself, always charging around in a very un-Powell like manner." [504] Powell combined his undergraduate college studies at Washington and Lee University, with law school. When he received his undergraduate degree in 1929 graduating magna cum laude, he had already completed one year of law school. He also had been elected president of the student body. In 1931, he graduated first in his law school class, and left to spend an extra year at Harvard Law School. As he grew older, his self-confidence increased. As his self-confidence increased, he became more emotional. In one instance, the following transpired:

> “The same case produced the only known instance when Powell completely lost his self-control. . . . the counsel tables in the Spartanburg courtroom were arranged two deep. One day Powell was speaking from behind the rear table when a lawyer seated in front of him turned around and called him a “goddamned liar.” Powell climbed across the table and took a swing at the man, for which he was promptly held in contempt of court.” [505]

In 1941, he became Chairman of the Junior Bar Conference of the American Bar Association. Like most southerners, he was of the belief that the constitutionality of segregation was long established and he did not question its' legitimacy. In 1951, just a few years before *Brown v. Board of Education* was decided by the Supreme Court, Powell became a member of the Richmond School Board. One year later, he was the board's chairman. Richmond at that time did not admit black children into white public schools, and Powell was a strong supporter of the detestable policy. The Richmond School Board with his assistance and leadership, did everything it could to frustrate the *Brown* decision.

This came back to haunt Powell during his confirmation hearings in 1971. He was justifiably accused of participating in the extensive scheme of southern states to destroy constitutional rights. In

1960, Richmond began admitting black children to white schools. Immediately thereafter, Powell submitted his resignation to the School Board.

By the early 1960s, Powell had the strongest base of clients of any lawyer in Virginia and was a partner in the large firm of Hunton, Williams. One of his most significant clients was Philip Morris. In support of his client, Powell took up smoking. The wife of one his clients remarked, "It's a good thing they don't sell condoms." [506] In 1964, he became President of the ABA. In numerous presentations, he emphasized the importance of complying with the rule of law (notwithstanding his own attempts to defy the law while on the Richmond School Board), condemned civil disobedience of any nature, and asserted that the cause of crime was excessive tolerance of drinking and gambling by society.

His ultra-conservatism, won him immense praise and support from the ABA crowd. It also caught the attention of President Richard Nixon. In 1971, Nixon appointed Powell to the U.S. Supreme Court. At one point during the confirmation process, he was backed up against the wall of the Senate Office Building by a group of women's rights activists. Attempting to be somewhat humorous, he stated:

> "Ladies . . . I've been married for thirty-five years and have three daughters. I've got to be for you." [507]

The crucial issue for Powell however, would not be gender, but race. He belonged to all-white organizations and sat on the board of directors of several large corporations, including Philip Morris. There was also an allegation that his firm had a policy against hiring blacks, but it could not be proven. The main subject was his Richmond School Board experience. The claim was made by Congressman John Conyers, Jr. that Powell "participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect." [508] Less than three months before his nomination to the Supreme Court, Powell had written "Civil Liberties Repression: Fact or Fiction?" which challenged the legitimacy of the civil rights movement. Notwithstanding, he was confirmed and sworn into office in 1972.

Unsurprisingly, Powell initially joined the conservative bloc of the Court consisting of Rehnquist, Burger, Blackmun and himself. They were all Nixon appointees. They consistently went up against Douglas, Brennan and Marshall (Justice Black had died and was no longer on the Court). Powell detested Douglas and thought he was a Son of a Bitch. [509] Interestingly, most of Douglas' friends also considered him a Son of a Bitch. In fact, Douglas himself would probably not only have admitted to such, but took pride in it. Like everyone else, Powell could not help but admire Douglas' intellect and was probably intimidated by him.

Powell's legacy on the Supreme Court was the issue of affirmative action. Beginning in 1978, with his opinion in the historic case of *Regents of the University of California v. Bakke*, and continuing to the conclusion of his sixteen years on the Court, Powell never Dissented in an affirmative action case. He was in fact the decisive vote, with the remainder of the Court aligned 4 to 4, awaiting his vote. He consistently voted in favor of affirmative action and minority preferences. It is difficult to reconcile this fact with his experience on the Richmond School Board, where it seems clear that he not only supported segregation, but attempted to frustrate desegregation.

One theory that has been advanced is that Powell felt it was simply "too late in the day" to forbid racial preferences. [510] As a result of the civil rights movement, affirmative action had become entrenched. Powell may have felt that if affirmative action was to be ended, it had to be done gradually. In the 1960s, he had spoken out against any type of civil disobedience. In the affirmative action cases, he had to balance his personal feelings about race, against the probability of the occurrence of civil disobedience if affirmative action were abruptly halted. This however, is concededly only a theory.

One of Powell's other interesting cases was *Lewis v. New Orleans,* in which he concurred with the liberal bloc that a person could not be criminally prosecuted for public use of the word "mother-fucking."[511] Burger, Blackmun and Rehnquist all Dissented in the case, but Powell concluded that abusive language in and of itself should not be constitutionally punished. It was a surprising opinion for him, particularly considering all of his earlier presentations condemning any type of civil disobedience. He also ruled in favor of free speech rights in the flag desecration cases.

When he left the bench in 1987, he was no longer characterized as a staunch conservative Justice. The Court itself had become immensely more conservative, and Powell was considered as being in the middle. He had become every liberal's favorite conservative.

NOTE: The presentation of most facts herein about Justice Lewis F. Powell's life is based on his biography: **John C. Jeffries Jr.**, *Justice Lewis F. Powell Jr.* (Charles Scribner's Sons, New York, 1994)

U.S. SUPREME COURT JUSTICE BENJAMIN CARDOZO

In the nineteenth century, the name Cardozo stood for judicial corruption. Benjamin's father, Albert Cardozo resigned from the bench in disgrace. He was as a Justice of the Supreme Court of New York and resigned when Benjamin was only two years old. Today, Benjamin Cardozo is regarded as one of the most respected Justices ever. Frankly speaking, I'm not one of his fans. He was too old-fashioned and traditional. I have difficulty identifying with his personality and his old-fashioned beliefs. Some of his opinions are totally ridiculous. It is irrefutable however that Judges and law professors today, admire and respect him.

Ben was born in 1870. Shortly after his birth, one of his uncles Benjamin Nathan Cardozo was savagely beaten and murdered. It was featured on the front pages of New York newspapers. His son, Washington Nathan Cardozo was named as a suspect, but no one was ever prosecuted. Around the same time, 200 hundred New York lawyers responding to public perceptions of judicial corruption created the New York City Bar Association and began a process of judicial reform. They forwarded to the New York legislature a report outlining various abuses of judicial power which named judges including Albert Cardozo. It ultimately resulted in his resignation from the bench.

For the rest of his life, Ben felt a need and desire to win back the honor of the family name, which he succeeded in doing.[512] His mother, Rebecca suffered from severe mental problems and spent time in a sanitarium. She ultimately had a stroke and died in 1879, when Ben was only nine years old.[513] After her death, Ben was raised by his older sister Ellen, who became his closet companion throughout life. She was eleven years older than him and they lived together until her death. He never married and never had children. In fact, it appears that he never even had a relationship with another woman and was celibate for his whole life. His other sister Emily, was the only one of the six children to marry.

He started college at Columbia University at age fifteen and was the youngest in his class. Two months into his freshman year, his father died. Newspaper reports of his father's death reminded his teachers and classmates of the judicial corruption associated with the Cardozo name.[514] He entered Columbia law school at age 19. During his second year of law school, there was a major upheaval, when the faculty announced the course of study was being lengthened from two to three years. Most of the students were angered by the unexpected change and left the school. Ben was one of them. U.S. Supreme Court Justice Benjamin Cardozo never graduated from law school.[515]

The fact that he had not graduated from law school was not particularly relevant at the time. He was admitted to the Bar and became a practicing attorney. He was sufficiently successful that by 1913 the name Cardozo carried a closer identity with the son, than the father. In 1914, he assumed a seat as a justice of the New York Supreme Court, the same Court his father had resigned from in disgrace 42 years earlier. One month later he was appointed to the New York Court of Appeals. Although in most states, the "Supreme Court" is the highest state court; in New York the Court of Appeals was the highest.

His views pertaining to a woman's right to vote were interesting to say the least. He was old-fashioned and his traditionalism caused him to emotionally oppose the right of women to vote. By the same token, he felt that common justice and conscience mandated that a woman be allowed to vote. When the New York suffrage amendment was put to a vote, Cardozo's sister said that he split the difference between his conflicting feelings. He voted in favor of giving women the right to vote, but felt guilty about it.[516] In his capacity as a Judge, his perceptions about women emerged in his opinions. In *Proctor v. Proctor*, the trial court denied a woman's petition for separation, finding that the couple's "disputes" were largely due to the influence of the husband's mother. Cardozo affirmed the trial court writing:

"I take it that the term "disputes" was meant by the judge as a euphemistic synonym for a trifling physical encounter, hardly more in his opinion than one of the usual amenities to be expected of a spouse when the influence of a mother-in-law is aggressive and disturbing."[517]

Cardozo's opinion presented the picture of Mr. Proctor's mother egging him on so much, that he slapped his wife in the face. Thus, in his opinion Mrs. Proctor's injury was not her husband's fault, but rather the fault of his mother.[518] There is little doubt in this author's mind, that if any Judge in today's world wrote such an opinion, they would be removed from the bench in record time. Such however was not the case in Cardozo's time. He went on to have a great judicial career. Another case, *In re McKenna,* involved a lawyer's appeal from a decision disbarring him for misusing the money of his client. Cardozo wrote:

"It is possible that this attorney is the victim of the typical woman client, who leaves everything to her lawyer, and then forgets her own acts or misconceives their significance."[519]

In 1920, at age 49, having been on the bench for six years, he was invited to deliver a series of lectures at Yale law school. He was to speak about the process a judge uses to arrive at a decision in a case. The hall was so crowded and the lectures so successful that faculty members asked him for a manuscript so they could publish it. Cardozo responded that he did not "dare to have it published" adding that:

"if it were published, I would be impeached." [520]

On occasion, he became angry when he disagreed with a decision of the U.S. Supreme Court. When the Supreme Court struck down a District of Columbia statute in *Adkins v. Children's Hospital*, Cardozo wrote to Felix Frankfurter who had argued on behalf of the statute at the Court:

"the District of Columbia case left me speechless, or at least ought to have left me that way, for such speech as I uttered was not respectful." [521]

On the issue of "candor," Cardozo's biographer Andrew Kaufman writes:

"Opinions have ranged from Cardozo as paragon of candor to Cardozo as master of deception. . . .
. . .
. . . Did he relate fully the governing legal reasons for his conclusion? . . .

Cardozo's desire to write with "style" affected his presentation of the facts in many cases. . . . he left out some facts that now seem important . . . especially from the perspective of the losing party. . . .

. . . **Likewise, occasionally he . . . did not present contrary authority** . . . ." [522]

Cardozo was sworn in as a U.S. Supreme Court Justice in 1932, after being appointed by the President. Justice McReynolds who he would serve with hated Jews and refused to associate with

Cardozo on the Court. McReynolds commented that all one needed in order to get on the bench was to be the son of a crook, obviously referencing Cardozo's father. When Cardozo died, McReynolds did not attend any of the three sessions at the Supreme Court honoring him.

Cardozo was undoubtedly a great intellect, but never got to enjoy life. From the day he was born, life hit him and his family hard. His opinions in the area of domestic relations exemplify his own inability to develop relationships, and the existing societal beliefs of the time. He had many emotional shortcomings, but the general consensus seems to be that he was just a very shy and bookish type of person. Frankly speaking, I just wish the guy had some more fun in his life.

Unlike many of the other Justices discussed herein, Cardozo probably would not have much difficulty satisfying today's contemporary State Bar moral character review process. The reason is that he never got to really enjoy life. They wouldn't be able to find anything negative about his past, because he didn't do much more than read and write. Oh wait, he never graduated from law school, so that would eliminate him too.

NOTE: The presentation of most facts herein about Justice Benjamin Cardozo's life is based on his biography: **Andrew L. Kaufman,** *Cardozo* (Harvard University Press, 1998)

U.S. SUPREME COURT JUSTICE EARL WARREN

Earl Warren was one of the most conservative law and order oriented politicians you could find. He was Governor of California for three terms. He subsequently became the most liberal Chief Justice the U.S. Supreme Court Justices has ever had. He was solidly aligned with the Douglas, Black, and Marshall power bloc. Intellectually, he wasn't quite as smart as any of them, but ideologically, he was with them all the way.

Warren's father taught him the importance of saving money early in life. He told Warren as a child that saving was a habit like drinking and smoking. [523] I've never heard that analogy before, but I like it. He also taught Warren the importance of education. In fact, through his middle age years, Warren's father took courses in accounting and mechanics (he was a car repairman). By the age of five, Warren's father had taught him to read and had him doing homework in advance of class at school.

In 1938, his father was murdered by an unknown assailant in Bakersfield. His mother, Chrystal Warren had already left his father. Warren at that time was in the midst of his campaign for Attorney General which he won. His mother died three years after his father's murder. [524]

In his high school years, Warren had what he described as a "cat and mouse" relationship with his high school principal. The principal had a suspicious accusatory mind and would often charge an entire class of wrongdoing, when no more than one or two had committed some type of prank. This inspired among Warren and his friends a behavior of, who could outwit whom. In his senior year, Warren was expelled. [525]

In law school, his "attitude" caused him further problems. At the end of his first year he was reprimanded by Dean William Carey Jones who suggested that he might not ever receive his J.D.. Warren also violated law school rules by obtaining outside employment with a local law office. In all likelihood, he would have been immediately dismissed from law school if they discovered, but they never found out. [526] In 1926, he was elected district attorney. In 1934, he lobbied the legislature for passage of an amendment that would allow prosecutors and judges to comment on a defendant's failure to take the stand in a criminal case. [527] This was a far cry from the Earl Warren that would write the Miranda opinion as Chief Justice in the 1960s.

In 1936, his office prosecuted the most notorious case of his career, the Point Lobos cases. The defendants were convicted, but many people thought they were innocent. His office was accused of engaging in "gross fourth amendment violations" and a "frame up." [528]

In 1938, he was elected Attorney General of California. In 1941, four years after the Point Lobos verdict, evidence surfaced that the chief prosecutor in Warren's office had a close relationship with one of the jurors. [529] Throughout the early 1940s, Warren was one of the individuals most responsible for the forcible relocation of Japanese-American citizens during World War II, into what were essentially concentration camps. The camps were enclosed with barbed wire and patrolled by armed guards. They were prisoners. They had violated no laws, and two-thirds of them were born in America. As Attorney General, he was in position to influence all other policy makers, but he eagerly supported the plan of relocation. It is the starkest contradiction of the career of one of the most liberal Justices ever on the Court. Decades later, he stated in his memoirs:

> "I have since deeply regretted the removal order and my own testimony advocating it. . . ." [530]

He also stated on another occasion late in life:

> "Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. . . ." [531]

In 1943, he was elected Governor of California on a conservative platform of law and order. He remained Governor until 1953. In 1953, he was nominated by President Eisenhower to be Chief Justice of the U.S. Supreme Court. Eisenhower nominated him mistakenly believing that he would be a conservative Republican Justice. The rest of the nation thought similarly. Everyone would be totally shocked. Warren would lead the most liberal Court of the century. He was a staunch adversary of Richard Nixon. Warren characterized Nixon as "untrustworthy, a scoundrel, a liar, completely unprincipled, and an exceedingly dangerous person." [532] Facetiously, this author must state that it's no wonder Nixon satisfied the State Bar's "good moral character" assessment.

When Warren became Chief Justice, he had absolutely no experience as a Judge. The case that allowed him to establish his strong presence on the Court was *Brown v. Board of Education*. He wrote the opinion for a unanimous Court overruling *Plessy v. Ferguson* and holding that segregation in public schools was unconstitutional. From that moment on, his presence was conclusively established. He was a solid member of the Black, Douglas, Marshall power bloc. Most notably, while Chief Justice of the U.S. Supreme Court, Earl Warren resigned from the American Bar Association because he did not agree with their ideological beliefs. After he resigned, the ABA falsely asserted that he failed to pay his dues and was therefore no longer a member. In doing so, the ABA lacked candor and was untruthful which reflects adversely on their moral character.

NOTE: The presentation of most facts herein about Chief Justice Earl Warren's life is based on his biography: **G. Edward White**, *Earl Warren - A Public Life,* (Oxford University Press, New York 1982)

U.S. SUPREME COURT JUSTICE BYRON "WHIZZER" WHITE

In Junior High School with his older brother Sam, who was in high school, Byron rented 25 acres of land and contracted to bring in the acreage's beet crop. They hired other boys to work for them. Neither of his parents graduated from high school. [533] Byron was extremely bright and studious. When he was in high school, the teacher gave the class a 200 question test and Byron scored the highest getting only one wrong. The next highest grade was 50% (100 wrong). He graduated with a straight "A" average. Even as a youth, he measured every single word and rarely showed emotion. [534]

After high school, he attended the University of Colorado where his nickname quickly progressed from "Straight-A White" to "Whizzer White," when he became a star football player. In 1937, he was selected as the first draft choice for the Pittsburgh Pirates. He also played baseball and became a Rhodes Scholar. In fact, he won seven letters, three in basketball, two in football and two in baseball. The press constantly wanted to interview him, and he detested the interviews. A few times, the interviews portrayed him poorly. His biographer Dennis Hutchinson, who also clerked for White when he was a Supreme Court Justice writes:

> "The only Denver reporter present was Chet Nelson, sports editor of the *Rocky Mountain News*. . . . "Would he play for Colorado again during the spring ?" Yes.
>
> A week after the luncheon, **White made a liar out of himself**, evidence that the weight of the decision and the relentless publicity attention were taking their toll. On March 31, he informed Harry Carlson, dean of men and coach of baseball, that he would not play baseball that spring."[535]

White was tough on the football field, but other players were jealous of his fame and gave him a hard time, to put it mildly. The following is an example:

> "In fact, White's body absorbed brutal physical punishment all season. His black eye was only the first, and he frequently found himself with a fist in the solar plexus or a knee in the kidneys after being tackled. . . . More than twenty years after his professional football career was over, when he was deputy attorney general of the United States, White explained . . . how he coped with the on-field muggings he received early in the season. . . .
>
> > "I was with the <Pirates>, and after the whistle was blown, they were kicking me in here and I asked the coach, "What'll I do?" and he said, "Wait till you catch one of them out of bounds and after the whistle's blown, then you kick him there and kick him in the face but be sure you kick them in both places and be sure the whistle's blown and everybody sees you. It'll cost the team twenty-five yards, but I'll be able to keep you for a couple of seasons." So Byron said he did just exactly that. He said he did a very good job of it. . . . and he said he never had any trouble after that." " [536]

He went on to Oxford and spent the summer of 1939 touring Germany. He got out of Germany in just the nick of time. White cabled his parents on August 29, 1939 indicating he had just left Munich. Three days later, on September 1, 1939, Hitler sent 1.5 million troops into Poland. Two days after that, Neville Chamberlain declared war on Germany. [537]

On May 6, 1942 White was appointed to be an ensign in the U.S. Navy. He was stationed in the Pacific. He had become friends with the Kennedys when he was at Oxford. John F. Kennedy was also

stationed in the Pacific. On the night of August 1-2, 1943, Kennedy was on patrol on PT 109. There was no moon and it was pitch black. His boat was rammed by a 2000-ton Japanese Destroyer, which then sped off into the night. Two crew members on the Kennedy boat were killed. Kennedy heroically guided most of the survivors on a four-hour swim to a safe island. In 1946, this event would be glorified to help win his congressional seat, and then later again in 1960 during the presidential election.

Immediately after the PT 109 incident, navy officials were faced with the question of how Kennedy's small boat which was considered to be the most maneuverable vessel in the world, could have been overtaken by a slow moving, huge Destroyer. The Navy Intelligence Report describing the incident, was written by Intelligence Officer Byron White. The White Report has been criticized by historians because it failed to address troubling questions. It lacked full, complete and accurate disclosure of material matters. An Annapolis historian characterized the PT 109 incident as follows:

> "PT-109 was the *only* patrol craft ever hit by a Japanese destroyer during the Pacific war. That particular night, Kennedy's command was part of a three-boat picket line that was *expecting* Japanese destroyers. When the collision came . . . two of Kennedy's men were asleep, and two were lying on deck. Visibility was almost one mile. . . . "Kennedy had the most maneuverable vessel in the world," recalled one PT squadron leader. "All that power and yet this knight in white armor managed to have his PT boat rammed by a destroyer. . . ." [538]

The White Report provided no information explaining why Kennedy was taken by surprise. White accounts for the locations of only 8 of the 13 crewmen, and it later emerged that Lennie Thom, the executive officer, was lying down on deck, not "standing beside the cockpit" as White falsely reported. [539] At best, the White report was uneven, providing an incomplete disclosure of the circumstances. [540] In 1946, at age 30, he left the Navy, obtained his law degree from Yale Law School and accepted a position clerking for Chief Justice Fred Vinson of the Supreme Court. The following occurred:

> "Vinson volunteered White - without his knowledge to speak at one of his sons' prep school sports banquets. When White learned of the obligation, he told Vinson, *I don't want to do this*. Vinson insisted and implored : *You can't make me look bad in front of my son*. "That was that," . . . "and Byron complied reluctantly." " [541]

Chief Justice Vinson's principal contribution to the Supreme Court involved "*in forma pauperis"* petitions (cases in which indigent prisoners cannot afford to pay filing fees). Vinson streamlined analysis by having Court clerks perform the initial review process. Of the 528 i.f.p. filings in the 1946 term, 322 (61 percent) came from Illinois. White declined to suggest that the Court review any. [542] Not even one.

In 1947, he entered the private practice of law in Colorado and became politically active. He assisted John F. Kennedy in his 1960 presidential campaign serving as national chairman of Citizens for Kennedy. The typical campaign work was as follows:

> "When White was in town, he worked a fourteen-hour day, capped at 10 p.m. by a drink with whoever else was still around, with Thompson serving as bartender . . . ." [543]

An interesting story related to the campaign involved civil rights leader, Martin Luther King, Jr., also involved Byron White. King was arrested at a sit-in at a segregated lunch counter in Atlanta, Georgia. He was taken 230 miles away to serve four months at hard labor. Black leaders feared that

King would be murdered in prison. Robert Kennedy took the extraordinary step of directly calling Judge Oscar Mitchell who had ordered King to prison and suggested that King should be allowed to post bail for the offense and be released. The Judge did so. The propriety of Kennedy's call was attacked by the media. After the election, Robert Kennedy was appointed attorney general, and Byron White was appointed deputy attorney general. Professor Harris Wofford of Notre Dame was trying to be appointed assistant attorney general, and had Robert Kennedy's support. Byron White and Wofford got together for a drink. Wofford described the meeting with White as follows:

> "The encounter was disastrous. Just back from teaching a weekly Notre Dame law course on professional responsibility, I told how I had spent the entire session on the propriety of Bob Kennedy's call to the Georgia judge requesting Martin Luther King's release from jail. The class was divided on the question of whether he should be disbarred for such behind-the-scenes intervention in a matter before the court. White asked me what I thought. . . . I said . . . reprimand, yes; disbarment, no. White was not amused. He commented sourly, "You might be interested to know that I recommended to Bob that he call that judge." [544]

In 1962, White was sworn in as a Justice of the U.S. Supreme Court. Most people expected him to sign on with the Warren, Black, Douglas liberal power bloc, but it soon became evident that he would not. His voting pattern was similar to Harlan. It is said that Harlan "weighed opposing arguments and White destroyed them." [545] White Dissented in the historic case of *Miranda v. Arizona,* which mandated the reading of constitutional rights to criminal suspects. He sarcastically wrote:

> "The real concern is. . . the impact on those who rely on the public authority for protection . . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." [546]

He also Dissented in *Roe v. Wade,* which constitutionalized a woman's right to abortion. Years later, he classified *Roe* as an "illegitimate decision." [547] He was known for making smart-alecky, biting, sarcastic comments. He said to one of his clerks in 1971:

> "You write very well," . . . "Justice Jackson had that problem, too." [548]

The most interesting and commendable aspect of White's career, in my view, concerned Justice William O. Douglas. In 1974, Douglas suffered a debilitating stroke on New Year's Eve, and sat out for most of the 1974 term. He tried to return in 1975, but appeared half-crippled, unable to remain alert and was incapable of speaking clearly. Nevertheless, he refused to resign. His condition prompted the other eight justices to meet secretly and they reached a decision that was unprecedented in the history of the Court. They took away his vote.

They secretly "agreed that no case would be decided five-four with Douglas in the majority." The policy would be invisibly enforced by simply ordering re-argument in any case where Douglas held the decisive vote. Byron White commendably objected to the decision. In his view, his colleagues had conducted a secret, and constitutionally unauthorized impeachment. He wrote a historic letter to Chief Justice Burger which he considered to be so sensitive in nature, that he would not even show a copy to his clerks. Three weeks after White's letter, Douglas agreed to retire. White's letter read in part:

"Dear Mr. Chief Justice :

I should like to register my protest against the decision of the Court not to assign the writing of any opinions to Mr. Justice Douglas. As I understand it from deliberations in conference, there are one or more Justices who are doubtful about the competence of Mr. Justice Douglas that they . . . . would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority. . . .

. . . In this instance, the action voted by the Court exceeds its powers and perverts the constitutional design.
. . .
. . . How does the Court plan to answer the petitioner who would otherwise have a judgment in his favor, who claims that the vote of each sitting Justice should be counted until and unless he is impeached by proper authorities and who inquires where the Court derived the power to reduce its size to eight Justices ?
. . .
. . . It would be better for everyone, including Mr. Justice Douglas, if he would not retire. . . .
. . .
If the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action. If it is an impeachable offense for an incompetent Justice to purport to sit as a Judge, is it not the task of Congress, rather than this Court, to undertake proceedings to determine the issue of competence ? . . .

This leads to a final point. The Court's action is plainly a matter of great importance to the functioning of the Court in the immediate future. . . . The decision should be publicly announced; and I do hope the majority is prepared to make formal disclosure of the action that it has taken.

Knowing that my seven colleagues, for whom I have the highest regard, hold different views, I speak with great deference. Yet history teaches that nothing can more readily bring the Court and its constitutional functions into disrepute than the Court's failure to recognize the limits of its own powers. . . . . " [549]

Byron White is to be commended for this letter. He was absolutely correct. It was an incredibly brave and courageous letter for him to write. As for the other Justices, both conservative and liberal alike, there is not a miniscule degree of doubt that the action they were planning to take was unlawful. The intended course of action of <u>seven</u> Justices, liberal and conservative, was unlawful thereby reflecting adversely on their moral character. This one, sole event, could conceivably have knocked out seven U.S. Supreme Court Justices from admission to the practice of law. Luckily, Byron "Whizzer" White, politically tackled them first.

NOTE: The presentation of most facts herein about Justice Byron White's life is based on his biography: **Dennis J. Hutchinson,** *The Man Who Once Was Whizzer White,* (The Free Press, New York, 1998)

SECOND CIRCUIT COURT OF APPEALS JUDGE LEARNED HAND

> *"Our dangers. . . are not from the outrageous but from the conforming; . . . from those, the mass of us, who take their virtues and their tastes, like their shirts and their furniture, from the limited patterns which the market offers."* [550]

Learned Hand was never a U.S. Supreme Court Justice. He was however one of the most well- known and respected Judges in the legal profession. He served 50 years on the federal bench, first appointed as a Federal District Judge in 1909 and marking his fiftieth year in 1959. Many historians and U.S. Supreme Court Justices consider him to have been the unofficial "tenth" Justice of the U.S. Supreme Court. Those who are knowledgeable of the reputations, opinions, beliefs, and background of U.S. Supreme Court Justices would have difficulty finding either a liberal or conservative who does not respect him, even if they don't agree with his opinions in certain areas.

I agree with some, but not all of his opinions. I definitely have respect for his logic and writing style. In today's world it is difficult to classify him as liberal or conservative. Viewed from the perspective of societal values and beliefs in today's world, he probably would be classified as a conservative. Yet, appraised within the context of his own time, he was undoubtedly liberal. In many respects, this paradox occurs because he served for such a long period of time on the bench. When he first became a Federal Judge, his opinions were considered liberal, perhaps even radical. Yet today, most of his opinions would probably be considered conservative.

His reputation is that of a ground-breaker in First Amendment law, yet many of his opinions in that area I find to be extremely disturbing. His reputation is that of a Judge who staunchly supported equality, and yet there seems to be substantial evidence that he had prejudicial tendencies. He seems to have had an unappealing tolerance for racism. Once again, in all fairness, I believe he must be assessed within the context of his time. In a letter to his wife, he wrote in reference to one of his daughters:

> "She has also changed a great deal in her attitude about Jews whom she can now see as humans. . . . She even regretted that she did not have a tincture of Jew in herself. So you see there has been a great change. [551]

Frankly speaking, I'm not entirely certain how to assess the foregoing quote. Overall, Learned Hand is by no means one of my favorite Judges. He is however, probably the one Judge I am unable to figure out the least, and that alone makes him worthy of consideration to me. Learned Hand along with Louis Brandeis, Oliver Wendell Holmes and Felix Frankfurter were arguably the equivalent of the Warren Court in the early 1900s, although Hand himself was not even on the U.S. Supreme Court.

He was renowned as the Justice who set the groundwork for a reformulation of First Amendment law in the 1960s. Yet, he held that the Smith Act of 1940, which prohibited the teaching of strict communistic doctrine, to be constitutional. This would seem to cut directly into the face of his reputation as a fervent supporter of the First Amendment. I have read conflicting assessments of him as both a liberal and a conservative. Frankly speaking, I am not entirely sure which category he belongs in. One thing is certain about Learned Hand however. He has the respect of other Judges, even in today's world.

While William O. Douglas, Hugo Black, and Thurgood Marshall have for the most part been unjustly and irrationally scorned by many ignorant members of the Judiciary in today's legal environment, Hand is universally admired. This provides an opportunity. Essentially, to the extent I demonstrate that my beliefs regarding the State Bar admissions process are supported, not only by prior U.S. Supreme Court Justices Douglas, Warren, Black and Marshall, but also by someone who was

arguably a "conservative," like Hand, my position gains credibility. It is for this reason that I include discussion of him herein.

He was not a brave man. His biographer, Gerald Gunther writes that even as a child he was beset with extraordinary self-doubts, indecision and anxiety. [552] His family was wealthy, and his father served on the New York Court of Appeals for a brief period. Throughout the early years of his life and as a student at Harvard, he felt that he was an outsider who just didn't fit in. He referred to himself as one of the obedient, docile boys who didn't drink, and worked every night. [553] He had no success with women and Gunther writes that as he neared age thirty in 1901 there was no indication that he had ever even kissed one. Ultimately he married Frances Fincke, a graduate of Bryn Mawr, at a time when it was virtually unheard of for a woman to be a college graduate.

The relationship between Learned and Frances was strange to say the least. Frances was extremely close friends with a woman named Mildred Minturn throughout her college years. If Gunther's biography of Hand is accurate, the relationship between Frances and Mildred seems to border on lesbianism, although Gunther suggests there was no sexual contact between the two. The letters between Frances and Mildred while possibly only representative of the times, would undoubtedly raise a circumspect eye in today's world. Gunther writes as follows:

> "Though Frances's and Mildred's effusive expressions of love to each other might arouse suspicions of lesbianism today, their mutual endearments were acceptable and conventional at the time, and there is no indication that their relationship was ever marked by overt sexual behavior." [554]

After they got married, Frances developed a long lasting "friendship" with a man named Louis Dow, who was also a friend of Hand. Throughout the years, Frances spent about as much time with Dow as she did with Hand. They constantly went on walks together, studied French together, went on picnics, ate dinner together and would even vacation together without Hand present, but with his knowledge. She would spend weeks at a time with Dow, while Learned was in a different city serving on the Court of Appeals. At dinnertime, Dow would often sit at the head of table. When Hand was not present, Dow would listen to the children's problems. Like I said, it was a strange marriage to say the least. [555]

Hand himself, was never a good lawyer by his own admission. [556] He was too intellectual and his presentations to the Court were too complicated for the Judges to appreciate or understand. He was not an exceptionally strong proponent of individuality, yet he did have a fervent belief that people should be able to express their opinions and beliefs. One of the statements he made that I like is:

> "Opinions are at best provisional hypotheses, incompletely tested. . . we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own." [557]

He believed in protecting dissenters stating:

> "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

Yet, once again I can not square this assertion with his opinion holding the Smith Act of 1940 to be constitutional. He supported Teddy Roosevelt, who vehemently attacked the legitimacy of the Judiciary. Teddy Roosevelt promoted ideas such as giving the general public the power to overturn judicial decisions through the voting power and judicial recall. This does not seem to reconcile with Hand's loyalty to the Judiciary, but does coincide with his belief that the Judiciary should not function

as a super-legislature. He was always extremely reluctant to declare any legislative statute unconstitutional. He believed in judicial independence, but did not feel it encompassed the power to override legislative decisions except in the rarest cases. His concern was that the tendency of Courts to function as super-legislatures threatened judicial independence.

Although admired by virtually all Judges today, Hand was not particularly fond of the U.S. Supreme Court which invalidated many progressive measures under both Teddy and Franklin Roosevelt. In a letter to Felix Frankfurter, later to be a renowned U.S. Supreme Court Justice, Hand denounced:

> "**the fatuous floundering of the Supreme Court** which goes by the name of Constitutional Law. . . . They suppose they are compelled by a rigid dialectic, that they are engaged in a deductive analysis (those of them who would know what the words meant), and **their work is pitiable from that aspect; most of it would disgrace any capable boy of 20** who had been trained by you or your colleagues. . . . **Let all <the> ponderous asses . . . be condemned to the pleasant Hell for them of smearing and gumming up the glutinous heterogeneous mass with their secretions in saecula saeculorum**" [558]

In response to the U.S. Supreme Court's decision in *Coppage v. Kansas* which struck down a Kansas law prohibiting the "yellow dog" labor contract under which non-membership in a labor union was a condition of employment, Hand wrote an essay printed in the February 6, 1915 issue of the New Republic. He criticized the U.S. Supreme Court as follows [559]:

> "Are we not finally driven to the conclusion that such decisions come from the prejudices of that economic class to which all the justices belong, and that they are merely unable to shake off the traditions of their education. . . . How else is it possible to understand such blindness to the beliefs of certainly half the economists of the present time?"

He is most well-known for his opinions on the Second Circuit Court of Appeals. They contain wit, sarcasm, and severe criticism of lower court judges and attorneys. Frankly speaking, I think this is what draws me to him more than anything else. In one case, he wrote in reference to another Judge:

> "Once I had the honor to sit in a court with the Hon. Henery Wormwood Rogers, a knight errant of the law, well know for voluminous comment on the principles of jurisprudence. . . chiefly perhaps because he never took his eye off the ball, for he never saw it. . . . If he got the ball himself and had an open field, he could have run as much as ten yards when he tripped over his own feet and fell. . . ." [560]

In addressing administrative boards he wrote:

> "In the hands of a biased Board such a power can become a fearful engine of oppression; and I am personally extremely skeptical as to their superior insight . . . . However, there cannot be any doubt that acquaintance with the field does make one's judgment better than that of the **ordinary boob judge**. . . ." [561]

He does not seem to have supported the prosecutions of those accused during the first "Red Menace" aimed at quelling Communism in this nation when the 1920s began. Yet, once again I can not

square this with his holding the Smith Act of 1940 to be constitutional. He wrote to a friend in reference to Congressional attempts aimed at the "Red Menace":

> "They worked themselves up into a frenzy of witch-hunting. . . . In doing that my own judgment is that they make two for every one they suppress, besides losing their heads and forgetting their most honorable traditions." [562]

Militating against his reputation as a liberal justice was his view on the Bill of Rights. He was not a proponent of liberal application of the Fourteenth Amendment due process clause and in fact even suggested that due to the overbroad nature of the due process clauses that they should be eliminated entirely. He stated:

> "It seems to me that the place to hit is the Amendments themselves. . . ."

To properly understand his early views on the due process clauses, one must understand the role of due process during the early 20th century. The due process clause of the Fourteenth Amendment at that time was used by the U.S. Supreme Court to inhibit reform by holding that legislative progressive measures were unconstitutional. Typically, application by the Court of the Fourteenth Amendment would be used at that time to invalidate legislative economic reforms that improved working conditions for laborers. The Court would hold that the legislative enactments violated the due process clause because they infringed on an individual's "liberty" to contract.

For instance, in perhaps the most famous case of all, *Lochner v. New York*, the U.S. Supreme Court invalidated a New York law that prohibited the employment of bakers for more than 60 hours per week, on the ground that it infringed on their liberty to contract freely with their employer. Liberal application of due process in that case, had a conservative result predicated on an arguably overbroad application of the due process clause.

In the 1950s and 1960s however, under the Warren Court, the due process clauses would be used by liberals to enhance individual liberty. Hand' s disdain for overbroad application of the due process clauses must be considered within the context of his time.

While due process in contemporary times is valued as a vital element of individual liberty, the U.S. Supreme Court in the early 20th century perverted the due process clauses to accomplish goals designed to frustrate legislative aims. Taken within this context, Hand's criticism of overbroad application of substantive due process, while undoubtedly paradoxical in the contemporary context of how one views a liberal, was at least logically fluent to the extent such laws were aimed at economic regulation in the early 20th century.

In 1925 after a referendum initiative drive, heavily backed by the Ku Klux Klan, the State of Oregon enacted a law that effectively banned private schools. Most of Oregon's private schools were religious ones, and the law was designed to stem "the rising tide of religious suspicions." The U.S. Supreme Court invalidated the law on substantive due process grounds. In this instance, striking down the law had a liberal, rather than a conservative result which was somewhat rare for the early 20th century. Both Justices Holmes and Brandeis, the most liberal members of the U.S. Supreme Court joined in with the majority opinion.

Hand disagreed with the result. The conclusion to be drawn is that Hand disagreed with overbroad application of the due process clause whether it had a liberal or a conservative result. He viewed due process not from a perspective of liberalism or conservatism, but rather from a perspective that the Court should not be functioning as a super-legislature. I have difficulty accepting his viewpoint in many regards, but I must concede that it is extremely consistent which lends towards his credibility.

I now turn to the impact of his ideas on the State Bar admissions process. In 1935, he was asked to fill out a questionnaire for the Tennessee Valley Authority (TVA) which was considering hiring one of his former law clerks. One of the questions in reference to the clerk inquired as follows:

> "To what extent is he motivated by professional ethics and considerations of the public good, rather than by the desire for personal profit ?"

Hand drafted the following reply:

> "I suppose he wants to make a living. I decline to answer such a silly question."

Another question on the form inquired in reference to the law clerk:

> "What contribution has he made without financial gain to himself to the well-being of his community?"

Hand's drafted response read as follows:

> "I don't know. Do you want competent lawyers, or unctuous self-righteous busy bodies? You can get here a perfectly reliable, capable young man with a sense of obligation to his job. I can't tell you more and would not answer such an absurd inquiry if I could." [563]

In August, 1947, as McCarthyism was in its' earliest stages, Hand wrote to his friend, Bernard Berenson:

> "the frantic witch hunters are given freer rein to set up a sort of Inquisition, detecting heresy wherever non-conformity appears." [564]

In the early 1950s, when McCarthyism flourished throughout America, during a speech to the Board of Regents of the University of New York, Hand stated:

> "Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust. . . . Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion. . . ." [565]

In 1955, at the forty eighth annual session of the American Jewish Committee where he received an American Liberties Medallion, Hand stated in his speech that the true "principles of civil liberties and human rights":

> "lie in habits, customs-conventions, if you will - that tolerate dissent and can live without irrefragable certainties" [566]

In 1953, he wrote a stinging Dissent predicated on governmental misconduct in the case of William Remington, a government economist who was a victim of McCarthyism and convicted of perjury for denying before a grand jury that he had "ever been a member of the Communist Party." His

Dissent focused on the grand jury's interrogation of Remington's former wife who tried to avoid testifying because "her husband's conviction would imperil the support he gave her and her children." Hand characterized the grand jury interrogation of Ann Remington as follows:

> "Pages on pages of lecturing repeatedly preceded a question; statements of what the prosecution already knew, and of how idle it was for the witness to hold back what she could contribute; occasional reminders that she could be punished for perjury; all was scattered throughout. Still she withstood the examiners, until, being much tried and warned, she said : " I am getting fuzzy. I haven't eaten since a long time ago and I don't think I am going to be very coherent from now on. I would like to postpone the hearings. . . . I want to consult my lawyers. . . ." This was denied, and the questioning kept on until she finally refused to answer, excusing herself because. . . she . . . "would like to get something to eat. . . . Is this the third degree, waiting until I get hungry, now?" Still the examiners persisted, disregarding this further protest : "I would like to get something to eat. But couldn't we continue another day?" [567]

The prosecutor's staff subsequently said the following to Ann Remington:

> "Mrs. Remington, I think that we have been very kind and considerate. We haven't raised our voices and we haven't shown our teeth, have we? Maybe you don't know about our teeth. A witness before a Grand Jury hasn't the privilege of refusing to answer a question. You see, we haven't told you that, so far. You have been asked a question. You must answer it. . . . You have no privilege to refuse to answer the question. I don't want at this time to – I said "showing teeth." I don't want them to bite you." [568]

Hand noted that the Fifth Amendment privilege against self-incrimination arose because of the abuses of the Star Chamber in the seventeenth century. He wrote:

> "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination." [568]

That is essentially how the Bar admission interview functions. The Applicant is not given the right to decline to answer unconstitutional questions. It is an ex parte examination that is adversarial in nature, although Courts repeatedly state falsely that it is not an adversarial proceeding. The Courts clearly lack candor in this area of the law. The concept from the State Bar and State Supreme Court's perspective is similar to that of the grand jury. Two goals exist, which are as follows. First, leverage the Applicant by holding the promise of a legal career over his head, and then wear down the Applicant by tiring him out.

On April 15, 1953, William Remington began serving his three-year prison term for perjury at the federal penitentiary. On November 22, 1954, eight months before he was to be released, while resting in his prison dormitory, three prisoners entered and beat him over the head with a brick wrapped in a sock. He died two days later. The image of government economist William Remington, convicted on questionable grounds at best, being bludgeoned to death in prison, haunted Learned Hand for the rest of his life. [569]

Hand's most significant contribution towards demonstrating the unconstitutionality of overbroad moral character assessment is evident in the opinions he wrote pertaining to immigration. U.S. naturalization laws in the late 1940s and 1950s required applicants for citizenship to show that during the five years immediately preceding the filing of a petition for naturalization they were "a person of good moral character." In *Schmidt v. United States*, 177 F.2d 450 (2nd Cir. 1949) the Second Circuit

had to determine whether an unmarried 39 year old college teacher who told the examiner that he had "now and then" engaged in acts of sexual intercourse with single women could qualify as a "person of good moral character." Gunther writes about Hand's approach to moral character issues as follows:

> "he considered it beyond a judge's duty and competence to impose his own moral standards upon the community." [570]
>
> "A criminal conviction alone did not suffice to justify deportation; Congress, with its "moral turpitude" language, had added the additional element that the crime "must itself be shamefully immoral." [571]
>
> "Hand never liked the open-ended, vague nature of the "good moral character" standard. Still, as a dutiful lower court judge, he did not feel free to refuse to take on the "absurd" task imposed by Congress. His resort to the "common conscience" formula was an effort to escape judicial subjectivism by relying on some outside source. One commentator has suggested that his escape route was in effect a plea "to Congress to get him out of the morals business" [572]
>
> "More than two decades later, several Supreme Court justices indicated sympathy with Hand's doubts. Justice Jackson's 1951 dissent in Jordan v. De George, joined by Justices Black and Frankfurter, insisted that the phrase had "no sufficiently definite meaning to be a constitutional standard for deportation" [573]
>
> "none of the judicial efforts "to reduce the abstract provision . . . to some concrete meaning" had been successful; not even a phrase akin to Hand's "common conscience" test – "the moral standards that prevail in contemporary society" – was sufficiently definite." [574]

Hand's test for "good moral character" was that which failed the "common conscience" test. In only one citizenship case did he ever hold that an alien's behavior indicated they lacked "good moral character." That case, ***Repouille v. United States***, 165 F.2d 152 (2d Cir. 1947) involved a man who committed euthanasia on his thirteen year old blind, mute and deformed son. The "common conscience" test described by Hand was as follows. Good moral character called NOT for those standards which we might ourselves individually approve, but rather for the moral feeling prevalent generally in the country. [575] The inquiry was to focus on whether in light of such moral standards prevalent in the country, one would be "OUTRAGED" by the conduct in question.

In ***U.S. v. Francioso***, 164 F.2d 163 (2nd Cir. 1947) the moral character issue involved an alien who had married his niece in 1925, knowing that under Connecticut law it was a forbidden, incestuous marriage. Hand ruled in favor of granting citizenship on the moral character issue stating:

> "Once more I wish to pay my respects to the sanctimonious, hypocritical, illiterate animaleulae who infest and infect the Naturalization Bureau." [576]

Hand adhered consistently to his "common conscience" standard in "moral character" cases.[577] In ***U.S. ex rel Guarino v. Uhl, Director of Immigration***, 107 F.2d 399 (2d Cir. 1939), he determined that possession of a "jimmy," a burglary tool, with criminal intent did not constitute a crime of "moral turpitude." In a pre-conference memorandum he wrote as follows:

> "This alien was then a boy of seventeen and such boys might delight in having jimmies to pry their way into buildings or boxes or barrels for curiosity or mischief. Those would be crimes, it is true, but they would not be morally shameful." [578]

In the Second Circuit's published opinion in the *Guarino* case, he wrote:

> "Such crimes by no means "inherently" involve immoral conduct; boys frequently force their way into buildings out of curiosity, or a love of mischief, intending no more than to do what they know is forbidden. Such conduct is no more than a youthful prank, to which most high-spirited boys are more or less prone; it would be to the last degree of pedantic to hold that it involved moral turpitude and to visit upon it the dreadful penalty of banishment, which is precisely what deportation means to one who has lived here since childhood." [579]

Posusta v. United States, 285 F.2d 533 (2d Cir. 1961) involved a Czechoslovakian woman who had been the mistress of a married man since 1936. They married in 1959. Hand wrote as follows:

> "the test is not the personal moral principles of the individual judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time." [580]

The fact that a person had "been delinquent upon occasion in the past," did not preclude a finding of "good moral character." Rather instead, it is enough if he shows that he does not transgress the accepted canons more often than is usual." [581] *Yin-Shing Woo v. United States*, 288 F.2d 434 (2d Cir. 1961) involved a petitioner who was a native of China and translator for the State Department who had been arrested in New York City as a "scofflaw." He failed to answer 23 parking tickets and was released from jail after paying a fine of $ 345. The question was whether violation of these city ordinances indicated that he was not "well disposed to the good order. . . of the United States." Hand determined that disregard of parking regulations was not inimical to the "good order."

Hand was not a proponent of the Hugo Black – William Douglas power bloc which dominated the U.S. Supreme Court during the late 1950s and early 1960s. Black and Douglas were the strongest and most fervent critics of the ambiguous and vague moral character standards that were used as "dangerous instruments" by the State Bars. If Hand had been nominated to the U.S. Supreme Court, either in the 1930s or 1940s, it is strongly suggested by his biographer, Gunther that he would have consistently voted against Black and Douglas in many cases. Hand's ideological beliefs were more in accord with Felix Frankfurter who repeatedly opposed Black and Douglas.

Hand believed that courts had no more justification to intervene on behalf of personal rights such as speech and religion than on behalf of economic rights. That forms the foundation for his support from conservatives. I do not agree with his perspective. Courts should use the due process clauses aggressively to protect personal rights.

Nevertheless, it is irrefutable that Hand's beliefs with respect to due process are extremely consistent and this contributes to his credibility. There is little doubt that specifically because of his reluctance to use the courts for the enhancement of personal rights, he would have been one of the more conservative justices on the U.S. Supreme Court, if he had been on that bench in the 1950s. He sharply criticized the Court's opinion in *Brown v. Board of Education*, in which segregation was held to be unconstitutional. He rejected the view that underlay many of the Warren Court decisions justifying judicial activism on behalf of personal rights, but not economic regulations.

Yet, there is similarly no doubt that his reluctance to use the due process clauses for the purpose of invalidating legislative economic reforms would have made him one of the most liberal members of the U.S. Supreme Court, if he had been on that bench in the 1920s or 1930s. In many respects, this is the reason that he appeals to both conservatives and liberals. It is also the reason why his opinions on the moral character issue, although not equaling the support for this author's position that can be found in Black or Douglas' opinions, are important. When presenting an idea, concept or belief, if one finds support for their position in the viewpoints of both liberals and conservatives, the probability of that viewpoint being correct is dramatically increased. Gunther writes:

> "Frankfurter, Hand's sole intimate correspondent on the Warren Court, had grown increasingly bitter about most of his colleagues. He poured out scathing denunciations in letter after letter – and often added an "I could unto you a tale unfold" refrain." [582]

In a letter from Frankfurter to Hand dated September 17, 1957, Frankfurter wrote as follows regarding an issue pertaining to racial discrimination that might potentially be heard by the Court, and which the Court was reluctant to hear:

> "We twice shunted it away and **I pray we may be able to do it again, without being too brazenly evasive**." [583]

The operative term was "evasive." That is the term used consistently by the State Bars to deny admission to Applicants on the ground that "evasiveness," is demonstrative of a lack of good moral character. Yet, Frankfurter himself, one of the more conservative Justices on the Warren Court, concedes to the existence of the trait. Such being the case, application of "evasiveness," as a ground for denial of admission to the Bar must in all fairness be viewed as a hypocritical, double standard. Hand and Frankfurter did not like the Warren Court, and that Court is by far my own personal favorite, specifically because of its willingness to apply due process for the enhancement of personal rights. Yet, both the Warren Court and Learned Hand in one form or another, provide substantial support for the views I have presented herein on the moral character standard. That carries a lot of weight.

NOTE: The presentation of most facts herein about Justice Learned Hand's life is based on his biography: **Gerald Gunther,** *Learned Hand-The Man and the Judge*, (Harvard University Press, Mass. 1994)

22

CAN U.S. SUPREME COURT JUSTICES SURVIVE SCRUTINY UNDER THE STATE BAR's SO-CALLED "GOOD MORAL CHARACTER" STANDARD ?

Can the Justices of the U.S. Supreme Court satisfy the IRRATIONAL moral character standard applied by the State Bars, if U.S. Supreme Court opinions were subjected to the same disclosure standards required of a State Bar Applicant. The answer is that there is not the slightest chance. No Justice who has ever sat on the Court since this nation's inception would be admitted to the Bar. It is specifically the fact that the Justices perform their duties in a competent, brave and heroic manner (as I fervently believe they do) that would preclude them from satisfying the IRRATIONAL moral character standard adopted by the State Bars. The reason is as follows.

To be a competent and brave member of the U.S. Supreme Court, the Justice must be willing to point out each and every logical flaw in the reasoning of the other Justices who are not in agreement with their position. That is quite simply put, the only way in which the public can be sure the probability of arriving at a correct decision is maximized. If the Justices did not criticize each other, but instead all agreed unanimously in each and every case, the logical flaws in the legal positions adopted would not be exposed. And all legal positions have some logical flaw. The public has a right to know the weaknesses and potential ramifications of any legal position taken in every case. That unavoidably requires good U.S. Supreme Court Justices to be critical of each other's opinions.

I am quite well satisfied, and in fact proud that unlike many State Supreme Courts which have essentially just become institutional rubber stamps of approval, the Justices of the U.S. Supreme Court constantly ensure that the process of truth-finding is maximized. They accomplish this by criticizing the opinions of each other without hesitation. They freely point out, as they should, where opinions adverse to their own are misleading, appear to present false information, fail to disclose material information, or appear to be a product of manipulative tricks with logic.

The following quotes from some of their opinions are demonstrative. It is noteworthy that none of the Justices, whether conservative or liberal are exempt. They all do it, and they all should do it. The selection of the following opinion excerpts is designed solely to demonstrate how none of the Justices could pass muster under the State Bar's irrational "good moral character" standard. The selections therefore should not in any manner be construed by the reader as this author's approval or disapproval of the opinions expressed, some of which this author agrees with, and some which this author disagrees with.

More importantly, the inability of the Justices to sustain scrutiny under the State Bar's IRRATIONAL moral character standard, is obviously not an adverse reflection upon their character. Quite to the contrary. The Justices are clearly doing their job exceptionally well. Rather instead, it is an indictment of the State Bar's IRRATIONAL moral character standard and its' application. The Justices in my view, have admirably lived up to their responsibility to the public by writing passionate and critical opinions in which they express their viewpoints without any hesitation. This should be encouraged, not discouraged. I would be significantly more concerned if the opinions were all unanimous, replete with mutual admiration instead of containing sharp and biting criticism. That would lead me to believe that the Justices were hiding things from the public. But, I am quite pleased and proud to say that such is obviously not the case, as indicated by the following quotes.

I submit that the severe criticisms the Justices throw at each other conclusively demonstrate that they are each, whether conservative or liberal, doing their job to the best of their ability, and that it is the

IRRATIONAL nature of the State Bar's moral character review process which makes them falsely appear as immoral. The Justices are doing fine. The State Bars need to change because no U.S. Supreme Court Justice who has ever sat on the bench since this nation's inception can truly satisfy their IRRATIONAL standard of moral character. And that is because no human being who has ever existed on the face of this earth could do so. The so-called "good moral character" standard applied by the State Bars today is quite simply put, a ridiculous and unattainable standard which, if applied objectively and evenly would preclude every person on earth from being admitted to the State Bar. Consequently, the State Bars have resorted to applying it subjectively, discriminatively and unequally. To put the matter simply, they admit the people they "like," and deny admission to those that they "dislike."

The most applicable words and phrase in the U.S. Supreme Court opinion excerpts have been "BOLDED" by this author. They are as follows:

"The Court simply misses the point. . . ."

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)
Justice Rehnquist, Dissenting Footnote 2

". . . it is the dissent that "simply misses the point" . . . ."

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)
Justice Blackmun, Lead Opinion, Footnote 16

"Today the majority takes an extraordinary doctrine, developed cautiously by this Court over the past 50 years, and applies it to a circumstance, and in a manner, that is without precedent. Because of this unwarranted expansion of our previous cases, I dissent.
. . .
Finally, the Court asserts that I do not understand the nature of the conduct at issue here. . . . But of course, this is wrong. . . .Thus, it is the majority -- and not I -- that is guilty of "recharacterizing" the activity that Lakewood licenses."

City of Lakewood v. Plain Dealer Publ. Co., 486 U.S. 750 (1988)
Justices White, Stevens and O'Connor, Dissenting

"I regret to say -- and I do so with deference -- that **the majority has, by its broadside, swept away one of our most precious rights**, namely, the right of self-preservation.

Keyishian v. Board of Regent, 385 U.S. 589 (1967)
Justices Clark, Harlan, Stewart and White, Dissenting

"I do not believe that **giving this Court's seal of approval to such a gross misuse of the judicial process** is likely to lead to greater respect for the law, any more than it is likely to lead to greater protection for First Amendment freedoms."

Walker v. City of Birmingham, 388 U.S. 307 (1967)
Justices Warren, Brennan and Fortas, Dissenting

"And **the Court does so by letting loose a devastatingly destructive weapon** for suppression of cherished freedoms heretofore believed indispensable to maintenance of our free society.
. . .
The Court today lets loose a devastatingly destructive weapon for infringement of freedoms jealously safeguarded not so much for the benefit of any given group of any given persuasion as for the benefit of all of us. . . . Convictions for contempt of court orders which invalidly abridge First Amendment freedoms must be condemned equally with convictions for violation of statutes which do the same thing."

Walker v. City of Birmingham, 388 U.S. 307 (1967)
Justices Brennan, Warren, Douglas and Fortas, Dissenting

"The **Court's holding seems to me to carry seeds of mischief** that may impair the conceded ability of the authorities to regulate the use of public thoroughfares in the interests of all."

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)
Justice Harlan, Concurring

"The **Court has spun an intricate, technical web** but I fear it has **ensnared itself in its own remorseless logic** and arrived at **a result having no support in the facts** of the case or the governing law.
. . .
. . . But **surely the Court has its tongue in its cheek** when it infers from this record the possibility that Street was not convicted for burning the flag, but only for the words he uttered."

Street v. New York, 394 U.S. 576 (1969)
Justice White, Dissenting

"**Our failure to reverse is a serious setback for First Amendment rights** in a troubled field."

Jones v. State Board of Education of Tennessee, 397 U.S. 31 (1970)
Justices Douglas and Brennan, Dissenting

"Our Brother White agrees that the protection afforded by the First Amendment depends upon whether the issue involved in the publication is an issue of public or general concern. He would, however, confine our holding to the situation raised by the facts in this case, that is, limit it to issues involving "official actions of public servants." **In our view, that might be misleading**."

Rosenbloom v. Metromedia, 403 U.S. 29 (1971)
Justices Brennan, Burger and Blackmun in reference to Justice White

"With all respect, **I consider that the Court has been almost irresponsibly feverish** in dealing with these cases."

New York Times Co. v. United States, 403 U.S. 713 (1971)
Justices Harlan, Burger, and Blackmun, Dissenting

"I fully join in MR. JUSTICE BLACKMUN's dissent against **the bizarre result reached by the Court**."

Gooding v. Wilson, 405 U.S. 518 (1972)
Justice Burger, Dissenting

"It seems strange, indeed, that, in this, day a man may say to a police officer who is attempting to restore access to a public building, "White son of a bitch, I'll kill you," and "You son of a bitch, I'll choke you to death," . . . and yet constitutionally cannot be prosecuted and convicted under a state statute that makes it a misdemeanor to "use to or of another, and in his presence . . . opprobrious words of abusive language, tending to cause a breach of the peace. . . ." This, however, is precisely what the Court pronounces as the law today.
. . .
. . . I feel that, by decisions such as this one and, indeed, *Cohen v. California*, 403 U.S. 15 (1971), **the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*.**

Gooding v. Wilson, 405 U.S. 518 (1972)
Justices Blackmun and Burger, Dissenting

"**The tortured route which the majority takes** to give this oath a supposedly constitutional interpretation merely emphasizes the unconstitutional effect those words would have were they given their natural meaning."

Cole v. Richardson, 405 U.S. 676 (1972)
Justice Douglas, Dissenting Footnote 3

"**There is no merit, therefore, to the Court suggestion** that the question of whether "appellant's particular behavior was protected by the First Amendment" . . . is not presented."

Grayned v. City of Rockford, 408 U.S. 104 (1972)
Justice Douglas, Dissenting Footnote

"I cannot accept the validity of that analysis. In the first place, the Court makes no effort to define what it means by "substantial overbreadth." We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . .

More fundamentally, **the Court offers no rationale** to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. . . .
. . .
. . . if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed."

Broadrick v. Oklahoma, 413 U.S. 601 (1973)
Justices Brennan, Stewart and Marshall, Dissenting

"Rather than considering the "evidence" in the light most favorable to the appellee and resolving credibility questions against the appellant, as many of our cases have required, **the Court has instead fashioned its own version of events** from a paper record, some "uncontroverted evidence," and a large measure of conjecture. Since this is not the traditional function of any appellate court, and is surely **not a wise or proper use of the authority of this Court**, I dissent."

Hess v. Indiana, 414 U.S. 105 (1973)
Justices Rehnquist, Burger and Blackmun, Dissenting

"**These assertions are, of course, no less judicial fantasy** than that which the dissent charges the majority of indulging."

Parker v. Levy, 417 U.S. 733 (1974)
Justices Blackmun and Burger, Concurring

"And I believe **the rationale by which the Court reaches its conclusion is unsound**.
. . .
. . . Turning to the question of the State's interest in the flag, it seems to me that **the Court's treatment lacks all substance,"**

Spence v. Washington, 418 U.S. 405 (1974)
Justices Rehnquist, Burger and White, Dissenting

"The Court . . . states that the Virginia Supreme Court placed no limiting interpretation on its statute and that it implied that the statute might apply to doctors, husbands, and lecturers. **The Court is in error**: the Virginia Supreme Court stated that it would not interpret the statute to encompass such situations."

Bigelow v. Virginia, 421 U.S. 809 (1975)
Justice Rehnquist, Dissenting Footnote 1

"In so doing, the Court attempts to distinguish *Flowers* from this case. That attempt is wholly unconvincing, both on the facts and in its rationale."

Greer v. Spock, 424 U.S. 828 (1976)
Justices Brennan and Marshall, Dissenting

"Not only does the Court's forum approach to public speech blind it to proper regard for First Amendment interests, but also the Court forecloses such regard by studied misperception of the nature of the inquiry required in Flower. . . . Thus, **contrary to the Court's inaccurate reformulation**, Flower did not go so far as to require that the military "abandon any right to exclude civilian vehicular and pedestrian traffic," . . . .
. . .
. . . Most important, however, in advancing such a justification, **the Court engages in a rude refusal** even to acknowledge the firmly fixed limitation on governmental control of First Amendment activity afforded by the doctrine against prior restraints."

Greer v. Spock, 424 U.S. 828 (1976)
Justices Brennan and Marshall, Dissenting

". . . Yet the Court's opinions in this case . . . go distressingly far toward deciding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by so doing.

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society."

Greer v. Spock, 424 U.S. 828 (1976)
Justice Marshall, Dissenting

"There are undoubted difficulties with an effort to draw a bright line between "commercial speech," on the one, hand and "protected speech," on the other, and **the Court does better to face up to these difficulties than to attempt to hide them under labels."**

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976)
Justice Rehnquist, Dissenting

"**The Court has plainly departed** from the teaching of these cases. . . .
Under our cases, therefore, **more is required to be shown than the Court's opinion reveals** to affirm the issuance of the injunction."

Wooley v. Maynard, 430 U.S. 705 (1977)
Justices White, Blackmun and Rehnquist, Dissenting in part

"**The logic of the Court's opinion leads to startling, and, I believe, totally unacceptable, results,"**

Wooley v. Maynard, 430 U.S. 705 (1977)
Justices Rehnquist and Blackmun, Dissenting

"In my view**, the Court's holding is a grave repudiation** of nearly 200 years of judicial precedent and historical practice. . . .

I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. . . ."

Nixon v. Administrator of General Services, 433 U.S. 425 (1977)
Justice Burger, Dissenting

"I think that not only the Executive Branch of the Federal Government, but the Legislative and Judicial Branches as well, **will come to regret this day when the Court has upheld an Act of Congress that trenches so significantly on the functioning of the Office of the President**."

Nixon v. Administrator of General Services, 433 U.S. 425 (1977)
Justice Rehnquist, Dissenting

"**The Court's fundamental error** is its failure to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. . . . Moreover, **the result reached today in critical respects marks a drastic departure from the Court's prior decisions** which have protected against governmental infringement the very First Amendment interests which the Court now deems inadequate to justify the Massachusetts statute."

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)
Justices White, Brennan and Marshall, Dissenting

"**MR. JUSTICE WHITE argues, without support** in the record, that, because corporations are given certain privileges by law, they are able to "amass wealth" and then to "dominate" debate on an issue."

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)
Justice Powell, Lead Opinion Footnote 30

"The **ultimate irony of the Court's analysis is that** (Sec.) 5.13(d) because of its broad sweep, actually **encourages deception**."

Friedman et al. v. Rogers et al., 440 U.S. 1 (1979)
Justices Blackmun and Marshall, Concurring in part and Dissenting in part

"In my view, **the Court's holding departs from the precedent it purports to follow** and precludes effective judicial review of the conditions of pretrial confinement. . . .

. . .

Although the Court professes to go beyond the direct inquiry regarding intent and to determine whether a particular imposition is rationally related to a nonpunitive purpose, this exercise is, at best, a formality. . . . Yet this toothless standard applies irrespective of the excessiveness of the restraint or the nature of the rights infringed."

Bell v. Wolfish, 441 U.S. 520 (1979)
Justice Marshall, Dissenting

"For the Court seems to use the term "intent" to mean the subjective intent of the jail administrator. This emphasis can only "encourage hypocrisy and unconscious self-deception."

Bell v. Wolfish, 441 U.S. 520 (1979)
Justices Stevens and Brennan, Dissenting

"**The Court egregiously errs** in holding that *Greer v. Spock*, 424 U.S. 828 (1976) compels the validation of these regulations."

Brown v. Glines, 444 U.S. 348 (1980)
Justice Brennan, Dissenting

"The Court's analysis, in my view, is wrong in several respects. . . . I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation. . . . Finally, the Court, in reaching its decision, improperly substitutes its own judgment for that of the State. . . .

. . .

. . . The Court's analysis ignores the fact that the monopoly here is entirely state-created. . . .

. . .

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905). . . .

. . .

The Court's analysis in this regard is in my view fundamentally misguided. . . .

. . .

. . . **Otherwise, as here, the Court will have no factual basis for its assertions**."

Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557 (1980)
Justice Rehnquist, Dissenting

"As said by Mr. Justice Jackson, concurring in the result in *Brown v. Allen*, 344 U.S. 443, 540 (1953), **"we are not final because we are infallible, but we are infallible only because we are final."**

. . .

However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, **it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure."**

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
Justice Rehnquist, Dissenting

"**I shall not again seek to demonstrate the errors of analysis in the Court's opinion** in *Gannett*."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
Justice Blackmun, Concurring Footnote 3

"Despite **the rhetorical hyperbole of THE CHIEF JUSTICE's dissent**, there is a considerable amount of common ground between the approach taken in this opinion and that suggested by his dissent. . . .
. . .
Despite his belief that this is "the essence of . . . democracy," this has never been the approach of this Court when a legislative judgment is challenged as an unconstitutional infringement of First Amendment rights.
. . .
Taken literally, THE CHIEF JUSTICE's approach would require reversal of the many cases striking down antisolicitation statutes on First Amendment grounds. . . . Despite the dissent's assertion to the contrary, however, it has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area. . . .
. . .
Because **THE CHIEF JUSTICE misconceives** the nature of the judicial function in this situation, **he misunderstands** the significance of the city's extensive exceptions to its billboard prohibition. . . ."

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981)
Justices White, Stewart, Marshall and Powell, Lead Opinion

"**The plurality's treatment** of the commercial-noncommercial distinction in this case **is mistaken** in its factual analysis of the San Diego ordinance, and **departs from this Court's precedents**."

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981)
Justices Brennan and Blackmun, Concurring

"**Today the Court takes an extraordinary -- even a bizarre -- step.** . . .
. . . **The Court's disposition of the serious issues involved exhibits insensitivity** to the impact of these billboards. . . . Indeed, **lurking in the recesses of today's opinions is a not-so-veiled threat** that the second option, too, may soon be withdrawn. . . .
. . .
. . . **This is the essence of both democracy and federalism, and we gravely damage both** when we undertake to throttle legislative discretion and judgment at the "grass roots" of our system.
. . .
In a bizarre twist of logic, the plurality seems to hold . . . .
. . .
The plurality today trivializes genuine First Amendment values. . . .
. . .
The **Court today unleashes a novel principle, unnecessary and, indeed, alien to First Amendment doctrine** announced in our earlier cases. . . . The **plurality gravely misconstrued** the commercial-noncommercial distinction of earlier cases. . . ."

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981)
Justice Burger, Dissenting

"(1) . . . **it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more keenly my contribution to this judicial clangor. . . ."**

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981)
Justice Rehnquist, Dissenting

"Because **the Court's lenient approach** towards the restriction of speech for reasons of aesthetics **threatens seriously to undermine the protections of the First Amendment**, I dissent.

. . . **the answers that the Court provides reflect a startling insensitivity** to the principles embodied in the First Amendment. . . .
. . .
Regrettably, the Court's analysis is seriously inadequate."

Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)
Justices Brennan, Marshall and Blackmun, Dissenting

"Believing that in this case the overbreadth doctrine is not merely "strong medicine," . . . but "bad medicine," I dissent.
. . .
The Court, therefore, is simply mistaken when it claims that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits.
. . .
. . . As noted, **the Court simply misunderstands** the primary purpose and effect of the statute. . . . **its vision proves sadly deficient."**

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)
Justices Rehnquist, Burger, Powell and O'Connor, Dissenting

"It trivializes the First Amendment to seek to use it as a shield in the manner asserted here. And it tells us something about why many people must wait for their "day in court" when the time of the courts is preempted by frivolous proceedings that delay the causes of litigants who have legitimate, nonfrivolous claims."

Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984)
Justice Burger, Concurring

"**The Court's disposition of this case is marked by two related failings**. First, **the majority is either unwilling or unable to take seriously the First Amendment claims** advanced by respondents. . . . Second, **the majority misapplies the test** for ascertaining whether a restraint on speech qualifies as a reasonable time, place, and manner regulation. . . .
. . .
. . . **the Court thereby avoids examining closely the reality** of respondents' planned expression. . . .

Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984)
Justices Marshall and Brennan, Dissenting

"A disquieting feature about the disposition of this case is that it lends credence to the charge that judicial administration of the First Amendment . . . tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas."

Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984)
Justice Marshall, Dissenting Footnote 14

"**JUSTICE REHNQUIST's effort** to prop up his position by relying on our decisions upholding certain provisions of the Hatch Act . . . **only reveals his misunderstanding** of what is at issue in this case."

FCC v. League of Women Voters of California, 468 U.S. 364 (1984)
Justice Brennan, Lead Opinion Footnote 27

"The key to this paradoxical result lies in the fact that somewhere between the beginning and the end of his opinion, **JUSTICE WHITE stops reviewing the statutes . . . and begins assessing a statutory scheme of his own creation. . . .**

. . .

Because **the First Amendment interests** at stake in this case **are denigrated by the Government . . . and all but ignored by JUSTICE WHITE**, it becomes necessary to emphasize their nature and importance. . . ."

Regan v. Time, Inc., 468 U.S. 641 (1984)

Justices Brennan and Marshall, Concurring in part, Dissenting in part

". . . **JUSTICE STEVENS, largely ignoring the text of the statute** . . . seems to treat the "purposes" language as though it adds nothing to the "publications" requirement. **I believe he thereby carries the principle** of construing statutes in order to save them from constitutional attack **"to the point of perverting the purpose. . . ."**

Regan v. Time, Inc., 468 U.S. 641 (1984)

Justice Brennan, Concurring in part, Dissenting in part Footnote 1

"**One does not have to read the Court's opinion very closely to realize** that its interpretation of the Act is, in fact, based on **a thinly disguised conviction** that the Act is unconstitutional. . . . Indeed, **the Court tips its hand** when its discusses the Court's decisions in *Lovell v. City of Griffin*. . . ."

Lowe v. SEC, 472 U.S. 181 (1985)

Justices White, Burger and Rehnquist, Dissenting

"The **Court's decision** to the contrary **is wholly inconsistent with the purpose and history** of . . . well-established principles respecting interlocutory review of preliminary injunctions, and common sense.

. . .

Contrary to the Court's assertion, there is much more than a "semantic difference" between a finding of likelihood of success sufficient to support preliminary relief and a final holding on the merits.

. . .

. . . **Having thus mischaracterized the District Court' decision, the Court then purports** "to decide this case on the merits,". . . .

. . .

. . . **the opinion of the Court seizes upon the underlying purposes** of (Sec.) 1252 in order **to evade** the well-established rule prohibiting appellate courts from even purporting to "intimate . . . views" on the ultimate merits when reviewing preliminary injunctions. . . .

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985)

Justices Brennan and Marshall, Dissenting

"The Court does not appreciate the value of individual liberty. . . .

. . .

. . . I must comment on two aspects of the Court's rhetoric. . . .

. . .

. . . Just as I disagree with the present Court's crabbed view of the concept of "liberty," so do I reject its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.

. . .

Unfortunately, **the reason for the Court's mistake today is all too obvious. It does not appreciate the values of individual liberty."**

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985)

Justices Stevens, Brennan and Marshall, Dissenting

"**The way the Court utilizes the *Mathews v. Eldridge* procedural due process analysis is somewhat misleading. . . .**"

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985)
Justice Stevens, Dissenting Footnote 19

"**JUSTICE STEVENS misunderstands** the nature of the Superior Court's limiting construction of the statute. . . ."

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)
Justice Rehnquist, Lead Opinion Footnote 9

"In so doing, **the Court** significantly and **irrationally expands** the definition of "public concern". . . . Because I believe **the Court's conclusions rest upon a distortion** of both the record and the Court's prior decisions, I dissent.
. . .
The **Court reaches the opposite conclusion only by distorting** the concept of "public concern." . . . .
. . .
The **Court's sweeping assertion . . . is simply contrary to reason and experience**."

Rankin v. McPherson, 483 U.S. 378 (1987)
Justices Scalia, Rehnquist, White and O'Connor, Dissenting

"The **dissent accuses us of distorting** and beclouding the record, evidently because we have failed to accord adequate deference to the purported "findings" of the District Court. . . . We find the District Court's "findings" from the bench significantly more ambiguous than does the dissent."

Rankin v. McPherson, 483 U.S. 378 (1987)
Justice Marshall, Lead Opinion Footnote 8

"Therefore, the dissent concludes, the actual ordinance at issue involves no "activity protected by the First Amendment," and thus is not subject to facial challenge. However, **that reasoning is little more than a legal sleight-of-hand**, misdirecting the focus of the inquiry. . . ."

City of Lakewood v. Plain Dealer Publ. Co., 486 U.S. 750 (1988)
Justices Brennan, Scalia, Marshall and Blackmun, Lead Opinion

"The dissent suggests that the *Kovacs* plurality's distinction of *Saia* is somehow not good law, because four other Justices (three of whom were in dissent) adopted the broader rationale that *Saia* was actually repudiated. JUSTICE WHITE's interpretation of *Kovacs* does not square with out settled jurisprudence: when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." . . . . In any event, history has vindicated the plurality's distinction. *Saia* has been cited literally hundreds of times in its 40-year history (a strange phenomenon had that case been "repudiated"), and never with the notation "overruled on other grounds."

City of Lakewood v. Plain Dealer Publ. Co., 486 U.S. 750 (1988)
Justice Brennan, Lead Opinion Footnote 9

"**The Court today abandons** Martinez" fundamental premise. In my opinion, its suggestion that three later opinions applying reasonableness standards warrant this departure . . . is disingenuous.
. . .
". . **. the Court applies a manipulable "reasonableness" standard** to a set of regulations that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates."

Thornburgh v. Abbott, 490 U.S. 401 (1989)
Justices Stevens, Brennan and Marshall, Concurring in part, Dissenting in part

"The Court's role as the final expositor of the Constitution is well established, but its **role as a platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government."**

Texas v. Johnson, 491 U.S. 397 (1989)
Justices Rehnquist, White and O'Connor, Dissenting

"I do not agree with the plurality's conclusion that the overbreadth defense is unavailable when the statute alleged to run afoul of that doctrine has been amended to eliminate the basis for the overbreadth challenge**. It seem to me strange judicial theory** that a conviction initially invalid can be resuscitated by postconviction alteration of the statute under which it was obtained. . . .
. . .
The **plurality seeks to cloak** its extravagant constitutional doctrine in conservative garb borrowed from an entirely different area of the law . . . ."

Massachusetts v. Oakes, 491 U.S. 576 (1989)
Justices Scalia and Blackmun; and Justices Brennan, Marshall and Stevens in part, Concurring in part, Dissenting in part

"**JUSTICE SCALIA's statement** that "the defendant here apparently intended to send his stepdaughter's photograph" to one of the "pornographic magazines that use young female models," . . . therefore **seems to me inappropriate."**

Massachusetts v. Oakes, 491 U.S. 576 (1989)
Justice Brennan, Dissenting Footnote 5

"Indeed, to reach its result, the majority must characterize as "dicta" the Court's reference to "least restrictive means" analysis . . . although this reference seems integral to the Court's holding . . . ."

Board of Trustees of State University of NY v. Fox, 492 U.S. 469 (1989)
Justice Blackmun, Dissenting Footnote 1

"Although **JUSTICE KENNEDY repeatedly accuses** the Court of harboring a "latent hostility" or "callous indifference" toward religion . . . nothing could be further from the truth, and **the accusations could be said to be as offensive as they are absurd. . . .**

JUSTICE KENNEDY's accusations are shot from a weapon triggered by the following proposition. . . .

. . . JUSTICE KENNEDY thus has it exactly backwards when he says that enforcing the Constitution's requirement that government remain secular is a prescription of orthodoxy. . . . Although **JUSTICE KENNEDY accuses the Court of "an Orwellian rewriting of history," . . . perhaps it is JUSTICE KENNEDY himself who has slipped into a form of Orwellian newspeak. . . ."**

County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Justices Blackmun, Brennan, Marshall, Stevens and O'Connor, Lead Opinion

"This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with out history and our precedents, and I dissent from this holding. . . .

. . .

As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases but also to their explications of the governing rules of law. Since the majority does not state its intent to overrule *Lynch*, I find its refusal to apply the reasoning of that decision quite confusing.

. . .

In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism threatens to trivialize constitutional adjudication. **By mischaracterizing the Court's opinion in *Lynch* as an endorsement-in-context test, . . . JUSTICE BLACKMUN embraces a jurisprudence of minutiae. . . .**

. . .

. . . **The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.**

County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Justices Kennedy, Rehnquist, White and Scalia, Concurring in part, Dissenting in part

"**Once stripped of this fiction, JUSTICE KENNEDY's opinion transparently lacks a principled basis**. . . .

. . .

JUSTICE KENNEDY is clever but mistaken in asserting that the description of the menorah . . . purports to turn the Court into a "national theology board."

County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Justice Blackmun, Lead Opinion Footnotes 57 and 60

"The **criticism that JUSTICE KENNEDY levels at JUSTICE O'CONNOR's endorsement standard for evaluating symbolic speech . . . is not only "uncharitable," . . . but also largely unfounded. . . .**"

County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Justice Stevens, Concurring in part, Dissenting in part, Footnote 6

"**JUSTICE STEVENS is incorrect** when he asserts that requiring a showing of direct or indirect coercion in Establishment Clause cases is "out of step with our precedent." . . . ."

. . .

"**The majority illustrates the depth of its error** in this regard by going so far as to refer to the concurrence as dissent in *Lynch* as "our previous opinions. . ."

County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Justice Kennedy, Concurring in part, Dissenting in part, Footnote 1 and 6

"**Justice SCALIA's transmogrification** of *Ginzburg*, however, is far from innocuous."

FW/PBS v. City of Dallas, 493 U.S. 215 (1990)
Justice Brennan, Concurring Footnote 1

"I join the Court's opinion. **As one of the "Orwellian" "censors" derided by the dissent** . . . . I write separately to explain my views in this case."

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)
Justice Brennan, Concurring

"In permitting Michigan to make private corporations **the first object of this Orwellian announcement**, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment. . . .

. . .

Which is why the Court puts forward its second bad argument. . . .

. . .

. . . **Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption** -- by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.

. . .

. . . **Today's reversal of field will require adjustment of a fairly large number of significant First Amendment holdings.** . . .

. . .

I would not do justice to the significance of today's decisions to discuss only its lapses from case precedent and logic. . . .

. . .

Because **today's decision is inconsistent with unrepudiated legal judgments** of our Court, but even more because **it is incompatible with the unrepealable political wisdom of our First Amendment**, I dissent.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)
Justice Scalia, Dissenting

"In the course of doing so, **the Court reveals a lack of concern** for speech rights that have the full protection of the First Amendment."

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)
Justices Kennedy, Scalia and O'Connor, Dissenting

"Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court."

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)
Justices Scalia, Rehnquist and Kennedy, Dissenting

"**We therefore disagree with JUSTICE SCALIA. . . . In our view, his analysis turns our constitutional doctrine on its head**. Instead of interpreting statutes in light of First Amendment principles, he would interpret the First Amendment in light of state statutory law. It seems to us that this proposal bears little relation to the values that the First Amendment was designed to protect."

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991)
Justices Blackmun, Rehnquist, White and Stevens, Lead Opinion

"The Court suggests . . . that the cost of NEA assistance would not be chargeable under the "statutory duties" test because the use of such assistance is not affirmatively *required* by the Michigan statute. This distorts what I mean by the "statutory duties" test."

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991)
Justice Scalia, Concurring in part, Dissenting in part, Footnote 4

"**JUSTICE SCALIA's views are similar to those of the Court, and suffer from the same defects**."
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
Justices White, Marshall, Blackmun and Stevens, Dissenting

"**JUSTICE SOUTER's analysis is at least as flawed as that of the Court**."
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
Justice White, Dissenting Footnote 2

"The Court's discussion of this question is limited to an ambiguous and noncommital paragraph toward the very end of the opinion. . . . Since that was the question decided by the Court of Appeals below, the question which divides the court of appeals, and the question presented in the petition for certiorari, one would have thought that the Court would at least authoritatively decide, if not limit itself to, that question."
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)
Justices Rehnquist, White, Scalia and Thomas, Dissenting

"This case could easily be decided within the contours of established First Amendment law. . . . **Instead, "finding it unnecessary" to consider the questions upon which we granted review, . . . the Court holds** the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in *Burson v. Freeman*. . . .

This Court ordinarily is not so eager to abandon its precedents. . . .

But in the present case, **the majority casts aside long-established First Amendment doctrine** without the benefit of briefing and adopts an untried theory. **This is hardly a judicious way of proceeding**, and the **Court's reasoning in reaching its result is transparently wrong**.
. . .
Today, **the Court has disregarded two established principles of First Amendment law** without providing a coherent replacement theory. . . . **The decision is mischievous at best**, and will surely confuse the lower courts."
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Justices White, Blackmun, O'Connor and Stevens, Concurring

"**I regret what the Court has done in this case.** The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening.

. . . It is sad that, in its effort to reach a satisfying result in this case, **the Court is willing to weaken First Amendment protections.**

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration -- **a case where the Court manipulated doctrine** to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than fighting words. . . ."
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Justice Blackmun, Concurring

". . . **the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland**, for the concept of "obscene antigovernment" speech is fantastical. . . .
. . .
. . . This new absolutism in the prohibition of content-based regulations severely **contorts** the fabric of settled First Amendment law.
. . .
. . . Stated directly, **the majority's position cannot withstand scrutiny**.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Justices Stevens, White and Blackmun, Concurring

"**JUSTICE STEVENS seeks to avoid the point** by dismissing the notion of obscene anti-government speech as "fantastical," . . . apparently believing that any reference to politics prevents a finding of obscenity. Unfortunately for the purveyors of obscenity, that is obviously false."

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Justices Scalia, Lead Opinion Footnote 4

"The **Court's analysis rests on an inaccurate view of history**."

International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)
Justices Kennedy, Blackmun, Stevens and Souter, Concurring

"I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech."

Lee v. International Society for Krishna Consciousness, 505 U.S. 830 (1992)
Justice O'Connor, Dissenting

"The judgment in today's cases has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. **That appearance is deceptive**."

Madsen v. Women's Health Center Inc.
Justices Scalia, Kennedy and Thomas, Concurring in part, Dissenting in part

"That possibility is simply not considered. Instead, the Court begins . . . with the following optical illusion. . . .
. . .
The utter lack of support for the Court's test in our jurisprudence is demonstrated by the two cases the opinion relies upon. . . ."

Madsen v. Women's Health Center Inc.
Justices Scalia, Kennedy and Thomas, Concurring in part, Dissenting in part

"JUSTICE STEVENS believes that speech-restricting injunctions "should be judged by a more lenient standard than legislation" because "injunctions apply solely to those who, by engaging in illegal conduct, have been judicially deprived of some liberty." . . . **Punishing unlawful action by judicial abridgement of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next."**

Madsen v. Women's Health Center Inc.
Justice Scalia, Concurring in part, Dissenting in part, Footnote 1

"Instead, the Court chooses to deny the petition for certiorari. . . .

No possible resolution of Madsen could have shown this case more flatly wrong than the opinion that issued. by holding the petition for Madsen, and then, in light of Madsen, letting the challenged injunction stand**, we send a confusing message to the North Carolina courts. And also, of course, we leave a clear judicial abridgement of petitioner's First Amendment rights in effect.** For these reasons, I dissent from the denial of certiorari."

Winfield v. Kaplan, 512 U.S. 1253 (1994)
Justices Scalia, Kennedy and Thomas, Dissenting

"I do not know where the Court derives its perception that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." . . . I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter."

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)
Justice Thomas, Concurring

"Last Term's decision in Madsen . . . has damaged the First Amendment more quickly and more severely than I feared."

Lawson v. Murray, 515 U.S. 1110 (1995)
Justice Scalia, Concurring

"What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional."

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996)
Justices Scalia and Thomas, Dissenting

"The people should not be deceived. While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress.
. . .
The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996)
Justices Scalia and Thomas, Dissenting

"The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide the case without uttering some sort of standard; so it has settled for synonyms. "Close judicial scrutiny," . . . is substituted for strict scrutiny, and "extremely important problem," . . . is substituted for "compelling interest." . . .

These restatements have unfortunate consequences. The first is to make principles intended to protect speech easy to manipulate. **The words end up being a legalistic cover** for an ad hoc balancing of interests. . . . Second, the plurality's exercise in pushing around synonyms for the words of our usual standards will sow confusion in the courts bound by our precedents."

Denver Area Educational Telecommunications v. FCC, 518 U.S. 727 (1996)
Justices Kennedy and Ginsburg, Concurring in part, Dissenting in part

"This is a wonderful expansion of judicial power. . . . **There is no precedent for this novel and dangerous proposition.**

. . .

Today's opinion makes a destructive inroad upon First Amendment law. . . . And it makes a destructive inroad upon the separation of powers in holding that an injunction may contain measures justified by the public interest apart from remediation of the legal wrong that is the subject of the complaint."

Schenck v. Pro-Choice Network of Western New York, No. 95-1065
Justices Scalia, Kennedy and Thomas, Concurring in part, Dissenting in part

"I concur in today's judgment, but, in doing so wish to dissociate myself from the "equal protection" rationale employed by the Court to justify its conclusions.

The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment. . . ."

Williams v. Illinois, 399 U.S. 235 (1970)
Justice Harlan, Concurring

"My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for **these opinions seriously invade the constitutional prerogatives of the States**, and regrettably hark back to the heyday of substantive due process."

Eisenstadt v. Baird, 405 U.S. 438 (1972)
Justice Burger, Dissenting

"With all due respect, I dissent. **I find nothing in the language or history of the Constitution to support the Court's judgment**."

Doe v. Bolton, 410 U.S. 179 (1973)
Justices White and Rehnquist, Dissenting

"**I do not believe that this claim** was properly preserved below or **is properly before this Court**. . . .

. . . **I believe that the Court errs in rendering an advisory opinion on the merits, an error compounded by the absence of any record below amplifying those merits. The Court not only renders an advisory opinion; but it renders it in a vacuum."**

Fuller v. Oregon, 417 U.S. 40 (1974)
Justice Douglas, Concurring

"**The majority obfuscates the issue** in this case . . . ."

Fuller v. Oregon, 417 U.S. 40 (1974)
Justices Marshall and Brennan, Dissenting

"But I think the Court has failed to come to grips with the real constitutional defect in the challenged statute."

Estelle v. Dorrough, 420 U.S. 534 (1975)
Justices Stewart, Brennan and Marshall, Dissenting

"The merits of this case can be dealt with very briefly. For it is, I believe, apparent on the face of the Court's opinion that **today's holding is flatly contrary to several recent decisions**. . . ."

Weinberger v. Salfi, 422 U.S. 749 (1975)
Justices Brennan and Marshall, Dissenting

"The **Court's conclusion . . . comes out of thin air**."

Stanton v. Stanton, 429 U.S. 501 (1977)
Justice Rehnquist, Dissenting

"Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have, instead, produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet . . . ."

Trimble v. Gordon, 430 U.S. 762 (1977)
Justice Rehnquist, Dissenting

"The Court's opinion in this case serves the unusual purpose of supplying as good a line of reasoning as is available to support a two-paragraph per curiam opinion almost six years ago in *Younger v. Gilmore*, 404 U.S. 15 (1971), **which made no pretense of containing any reasoning at all**."

Bounds v. Smith, 430 U.S. 817 (1977)
Justices Rehnquist and Burger, Dissenting

"I conclude by indicating the same respect for *Younger v. Gilmore*, 404 U.S. 15 (1971), as has the Court, in relegating it to a final section set apart from the body of the Court's reasoning *Younger* supports the result reached by the Court of Appeals in this case, but **it is a two-paragraph opinion which is most notable for the unbridged distance between its premise and its conclusion**. . . . I would not have the slightest reluctance to overrule *Younger*. . . ."

Bounds v. Smith, 430 U.S. 817 (1977)
Justices Rehnquist and Burger, Dissenting

"**Nothing in the Court's opinion justifies its wholesale abandonment of traditional principles of First Amendment analysis**."

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977)
Justices Marshall and Brennan, Dissenting

"I cannot join the opinion of the Court. **To hold, as the Court does . . . seems to me to misc**onceive the meaning of that constitutional guarantee. . . .

I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more accurately, that privilege, is, . . . limited by state law."

Zablocki v. Redhail, 434 U.S. 374 (1978)
Justice Stewart, Concurring

"The Court is understandably reluctant to rely on substantive due process. . . . But **to embrace the essence of that doctrine under the guise of equal protection serves no purpose but obfuscation**."

Zablocki v. Redhail, 434 U.S. 374 (1978)
Justice Stewart, Concurring

"The **Court's misapprehension** of the role of the institutionalized police function in a democratic society obfuscates the true significance of the distinction between citizenship and alienage."

Foley v. Connelie, 435 U.S. 291 (1978)
Justices Stevens and Brennan, Dissenting

"Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgement that the Framers of our Constitution, . . . openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known, and have been aptly called our "American Dilemma."

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)
Justices Brennan, Marshall, Blackmun and White, Concurring in part, Dissenting in part

"Most importantly, had the Court been willing in 1896, in Plessy v. Ferguson, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. . . . The majority of the Court rejected the principle of color blindness, and for the next 60 years . . . ours was a Nation where, by law, an individual could be given "special" treatment based on the color of his skin.
. . .
I fear that we have come full circle. . . . For almost a century, no action was taken, and this nonaction was with the tacit approval of the courts."

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)
Justice Marshall, Separate Opinion Concurring part, Dissenting in part

"Much as Caesar had his Brutus; Charles the First his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it."

Orr v. Orr, 440 U.S. 268 (1979)
Justices Rehnquist and Burger, Dissenting

"But **claims that the state judiciary itself has purposely violated the Equal Protection Clause are different**. There is a need in such cases to ensure that an independent means of obtaining review by a federal court is available on a broader basis. . . ."

Rose v. Mitchell, 443 U.S. 545 (1979)
Justices Blackmun, Brennan, Marshall, White and Stevens, Lead Opinion

"Dissenting opinions are more likely than not to quarrel with the Court's exposition of the law, but my initial quarrel is with the accuracy of the Court's paraphrasing and selective quotation from the Illinois statute. . . .
. . .
Only through this mischaracterization of the Illinois statute may the Court attempt to fit this case into the *Mosley* rule. . . .

. . . In fact, the very statute which the Court today cavalierly invalidates has been hailed by commentators. . . .
. . .
. . .The Court apparently believes it has a license to import the more relaxed standing requirements of First Amendment overbreadth into equal protection challenges. This however, is not and should not be the law."

Carey v. Brown, 447 U.S. 455 (1980)
Justices Rehnquist, Burger and Blackmun, Dissenting

"The fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of government, can discourage the exercise of fundamental liberties. . . ."

Harris v. McRae, 448 U.S. 297 (1980)
Justices Brennan, Marshall and Blackmun, Dissenting

"**There is "condescension" in the Court's holding. . . . there truly is "another world out there, the existence of which the Court, I suspect, either chooses to ignore or fears to recognize**". . . ."

Harris v. McRae, 448 U.S. 297 (1980)
Justice Blackmun, Dissenting

"The **court today purports** to apply this standard, but in actuality fails to scrutinize the challenged classification in the manner established by our governing precedents. **I suggest that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review**."

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980)
Justices Brennan and Marshall, Dissenting

"Because **the Court** is willing to accept a tautological analysis of congressional purpose, an assertion of "equitable" considerations contrary to the expressed judgment of Congress, and a classification patently unrelated to achievement of the identified purpose, it **succeeds in effectuating neither equity nor congressional intent**."

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980)
Justices Brennan and Marshall, Dissenting

"**The comments in the dissenting opinion** about the proper cases for which to look for the correct statement of the equal protection rational basis standard, and about which cases limit earlier cases, **are just that : comments in a dissenting opinion."**

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980)
Justice Rehnquist, Lead Opinion Footnote 10

"**Because I can find no support for this novel constitutional doctrine in either the language of the Federal Constitution or the prior decisions of this Court, I respectfully dissent**."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)
Justice Stevens, Dissenting

"JUSTICE STEVENS concedes the flaw in his argument when he admits that "a state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant federal constitutional standard." . . . And contrary to his argument that today's judgment finds "no precedent in this Court's decisions, . . . we have frequently reversed State Supreme Court decisions invalidating state statutes or local ordinances on the basis of equal protection analysis more stringent than that sanctioned by this Court. . . .

Indeed, JUSTICE STEVENS has changed his own view. . . . **Thus, JUSTICE STEVENS' argument in the dissenting opinion that today's treatment of the instant case is extraordinary and unprecedented, . . . is simply wrong.**"

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)
Justice Brennan, Lead Opinion Footnote 6

"The Court's disposition of this case is twice flawed : first, there is no jurisdiction to vacate the judgment. . . . second, the record does not sustain the factual inferences required to support the Court's judgment.
. . .
The Court asserts that "it is appropriate to treat the due process issue as one "raised" below and proceed to consider it here." . . . However, the Court fails to cite any passage from the record in which the alleged conflict of interest was presented to the state courts as a problem of constitutional dimension."

Wood v. Georgia, 450 U.S. 261 (1981)
Justice White, Dissenting

"The practice of holding hostages to coerce another sovereign to change its policies is not new; nor, in my opinion, is it legitimate. California acknowledges that its discrimination against Ohio citizens within its jurisdiction is specifically intended to coerce the Ohio Legislature into enacting legislation favored by California. Today the Court holds that this state purpose is legitimate."

Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981)
Justice Stevens and Blackmun, Dissenting

"**We trespass on the assigned function of the political branches** under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

The court makes no attempt to disguise that it is acting to make up for Congress' lack of "effective leadership". . . .

The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of "remedies" for the failures . . . of the political processes of our system of government. The court employs, and, in my view, abuses, the Fourteenth Amendment. . . .
. . .
. . . **If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example**."

Plyler v. Doe, 457 U.S. 202 (1982)
Justices Burger, White, Rehnquist and O'Connor, Dissenting

"The **Court's opinion is disingenuous**. . . ."

Plyler v. Doe, 457 U.S. 202 (1982)
Justice Burger, Dissenting Footnote 12

"**In rejecting appellees' equal protection challenge** on the basis that the State is proceeding "one step at a time," **the plurality today gives new meaning to the term "legal fiction**."

Clements v. Fashing, 457 U.S. 957 (1982)
Justices Brennan, Marshall, Blackmun and White, Dissenting

"The **plurality's sudden focus** on the fairness of the restriction to the individual, as opposed to the class**, is as episodic as it is novel.** For in writing for the Court in Weinberger v. Salfi, 422 U.S. 749, 781 (1975), JUSTICE REHNQUIST refused to hold that an otherwise valid legislative classification should be invalidated on the basis of the characteristics of the individual plaintiff."

Clements v. Fashing, 457 U.S. 957 (1982)
Justice Brennan, Dissenting Footnote 3

"**I dissent from the Court's unprecedented intrusion into the structure of a state government**."

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)
Justices Powell, Burger, Rehnquist and O'Connor, Dissenting

"**Nothing in *Hunter* supports the Court's extraordinary invasion** into the State's distribution of authority. . . .

Hunter, therefore is simply irrelevant. **It is the Court that, by its decision today, disrupts the normal course of state government.**"

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)
Justices Powell, Burger, Rehnquist and O'Connor, Dissenting

"Although I disagree today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedential value."

Brown v. Thompson, 462 U.S. 835 (1983)
Justices Brennan, White, Marshall and Blackmun, Dissenting

"The **Court attempts to escape these stark facts** through two lines of reasoning, each relying on an unspoken legal premise. Neither withstands examination.

First the Court apparently assumes that the only aspect of unequal representation that matters is the degree of vote dilution. . . . The Court is mistaken."

Brown v. Thompson, 462 U.S. 835 (1983)
Justices Brennan, White, Marshall and Blackmun, Dissenting

"The Court surprisingly announces that "there is no constitutional right to an appeal.". . . That statement, besides being unnecessary to its decision, is quite arguably wrong."

Jones v. Barnes, 463 U.S. 745 (1983)
Justice Brennan, Dissenting Footnote 1

"The **Court's misinterpretation** of the language of the statute is compounded by the **Court's subtle confusion** of statutory construction with constitutional interpretation."

United Brotherhood of Carpenters v. Scott, 463 U.S. 825 (1983)
Justice Blackmun, Dissenting Footnote 3

"The majority's attempts to distinguish these precedents are unconvincing. . . . No basis is advanced for this theory, because no basis exists."

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)
Justices O'Connor, Brennan, Marshall and Rehnquist, Dissenting

"This bold assertion marks a drastic and unfortunate departure from established equal protection doctrine. . . .In addition to unleashing an undisciplined form of Equal Protection Clause scrutiny, the Court's approach today has serious implications for the authority of Congress. . . .
. . .
. . . More importantly, to the extent **the Court today purports** to find in the Equal Protection Clause an instrument of federalism, it entirely misses the point of JUSTICE BRENNAN's analysis."

Metropolitan Life Ins. Co. v. Ward, 470 U.s. 869 (1985)
Justices O'Connor, Brennan, Marshall and Rehnquist, Dissenting

"**Today's opinion charts an ominous course. I can only hope this unfortunate adventure away from the safety of our precedents will be an isolated episode**."

Metropolitan Life Ins. Co. v. Ward, 470 U.s. 869 (1985)
Justices O'Connor, Brennan, Marshall and Rehnquist, Dissenting

"Having interpreted the statute so as to generate some discrimination, and then having declared the discrimination "wholly arbitrary," **the Court felicitously retreats to a holding sufficiently narrow as to strip its decision of any constitutional significance**."

Williams v. Vermont, 472 U.S. 14 (1985)
Justices Blackmun, Rehnquist and O'Connor, Dissenting

"In my view, **the Court's remedial approach is both unprecedented . . . and unwise. . . .**
. . .
The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. . . . No guidance is thereby given as to when **the Court's free-wheeling, and potentially dangerous, "rational basis standard"** is to be employed. . . ."

City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)
Justices Marshall, Brennan and Blackmun, Concurring in part, Dissenting in part

"In reaching the equal protection issue despite petitioner's clear refusal to present it, **the Court departs dramatically from its normal procedure without any explanation**. . . .
. . .
. . . it is **a strange jurisprudence** that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a). . . .

. . .Thus, at bottom, his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral argument on this claim might convince us to do otherwise. I believe that "decisions made in this manner are unlikely to withstand the test of time.". . .
. . .
Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss. . . ."

Batson v. Kentucky, 476 U.S. 79 (1986)
Justices Burger and Rehnquist, Dissenting

"**With little discussion and less analysis, the Court also overrules** one of the fundamental substantive holdings. . . . Because **I find the Court's rejection of this holding both ill-considered and unjustifiable** under established principles of equal protection, I dissent."

Batson v. Kentucky, 476 U.S. 79 (1986)
Justices Rehnquist and Burger (Separate Opinion), Dissenting

"The **Court's evaluation** of the significance of petitioner's evidence **is fundamentally at odds with our consistent concern for rationality. . . ."**

McCleskey v. Kemp, 481 U.S. 279 (1987)
Justices Brennan, Marshall, Blackmun and Stevens, Dissenting

"**The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated**. **The Court can indulge in such speculation only by ignoring its own jurisprudence** demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined -- an occasion calling for the most sensitive inquiry a court can conduct."

McCleskey v. Kemp, 481 U.S. 279 (1987)
Justices Brennan, Marshall, Blackmun and Stevens, Dissenting

"More important, the "neutrality" argument on its merits is both **deceptive and deeply flawed**."

Lyng v. International Union, 485 U.S. 360 (1988)
Justices Marshall, Brennan and Blackmun, Dissenting

"Today, **the court continues the retreat from the promise of equal educational opportunity**. . . . Because I do not believe that this Court should sanction discrimination against the poor . . . . I dissent.
. . .
I believe the Court's approach forgets that the Constitution is concerned with "sophisticated as well as simpleminded modes of discrimination."

Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988)
Justices Marshall and Brennan, Dissenting

"**The Court's decision to the contrary "demonstrates once again a 'callous indifference to the realities of life for the poor**.'" . . **. the Court fails** in its constitutional duties when it refuses, as it does today, to make even the effort to see. . . . **the Court denies equal opportunity and discourages hope**."

Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988)
Justices Marshall and Brennan, Dissenting

"Moreover, **JUSTICE MARSHALL's suggestion** that discrimination findings may be "shared" from jurisdiction to jurisdiction **is unprecedented, and contrary to this Court's decisions**."

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
Justice O'Connor, Lead Opinion

"The majority is wrong to trivialize. . . ."

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
Justices Marshall, Brennan and Blackmun, Dissenting

"Such insulting judgments have no place in constitutional jurisprudence."

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
Justices Marshall, Brennan and Blackmun, Dissenting

"Yet **this Court, the supposed bastion of equality**, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. . . .

So the Court today regresses."

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
Justices Blackmun and Brennan, Dissenting

"Today **the Court manipulates** existing and complex rules for employment discrimination cases in a way certain to result in confusion."

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
Justices Kennedy, Rehnquist and Scalia, Dissenting

"The **Court's application** of a lessened equal protection standard to congressional actions **finds no support** in our cases or in the Constitution."

Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990)
Justices O'Connor, Rehnquist, Scalia and Kennedy, Dissenting

"Since, in my view, **today's decision contradicts well established law in the area of equal protection** and of standing, I respectfully dissent.
. . .
Thus, today's holding cannot be considered in accordance with our prior law. It is a clear departure."

Powers v. Ohio, 499 U.S. 400 (1991)
Justices Scalia and Rehnquist, Dissenting

"Today's opinion makes a mockery of that requirement."

Powers v. Ohio, 499 U.S. 400 (1991)
Justices Scalia and Rehnquist, Dissenting

"Beyond this**, the Court has misstated the law**."

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991)
Justices O'Connor, Rehnquist and Scalia, Dissenting

"The majority's approach is also unsound because it will serve only to confuse the law."

Gregory v. Ashcroft, 501 U.S. 452 (1991)
Justices White and Stevens, Concurring in part, Dissenting in part

"In repudiating *Snowden*, moreover, the Court threatens settled principles not only of the Fourteenth Amendment, but of the Eleventh. . . .

I understand the Court prefers to distinguish *Allegheny Pittsburgh*, but, in doing so, **I think the Court has left our equal protection jurisprudence in disarray."**

Nordlinger v. Hahn, 505 U.S. 1 (1992)
Justice Thomas, Concurring in part

"Application of the standard (or standards) announced today has no justification in precedent. . . ."

U.S. v. Fordice, 505 U.S. 717 (1992)
Justice Scalia, Concurring in part, Dissenting in part

"The **Court today chooses** not to overrule, but rather **to sidestep**, *UJO*."

Shaw v. Reno, 509 U.S. 630 (1993)
Justices White, Blackmun and Stevens, Dissenting

"The Court today answers this question in the affirmative, and its answer is wrong. . . . **A contrary conclusion could only be described as perverse."**

Shaw v. Reno, 509 U.S. 630 (1993)
Justice Stevens, Dissenting

"In my view, there is no justification for the Court's determination to depart from our prior decisions. . . .
. . .
The **Court offers no adequate justification**. . . ."

Shaw v. Reno, 509 U.S. 630 (1993)
Justice Souter, Dissenting

"The Court's opinion suggests that African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting. Not very long ago, of course, it was argued that minority groups defined by race were the only groups the Equal Protection Clause protected in this context."

Shaw v. Reno, 509 U.S. 630 (1993)
Justice Stevens, Dissenting Footnote 4

"So well-entrenched was this exclusion of women that, in 1880, this Court . . . expressed no doubt that a State "may confine the selection (of jurors) to males."

J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)
Justices Blackmun, Stevens, O'Connor, Souter and Ginsburg, Lead Opinion

"The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Bradwell v. State, 16 Wall 130, 141 (1872)

"Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes. . . and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display -- a modest price, surely -- is that **most of the opinion is quite irrelevant to the case at hand."**

J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)
Justices Scalia, Rehnquist and Thomas, Dissenting

"Although **the Court's legal reasoning in this case is largely obscured** by anti-male-chauvinist oratory, to the extent such reasoning is discernible, it invalidates much more than sex-based strikes."

J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)
Justices Scalia, Rehnquist and Thomas, Dissenting

". . . **the Court imperils** a practice that has been considered an essential part of fair jury trial since the dawn of the common law."

J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)
Justices Scalia, Rehnquist and Thomas, Dissenting

"In dissent, JUSTICE STEVENS criticizes us for "delivering a disconcerting lecture about the evils of governmental racial classifications," . . . . With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.
. . .
JUSTICE STEVENS chides us . . . ."
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
Justice O'Connor, Lead Opinion

"Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, **the majority today virtually ignores the issue**. . . . It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases."
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
Justices Stevens and Ginsburg, Dissenting

"**The Court's suggestion** that it may be necessary in the future to overrule Fullilove in order to restore the fabric of the law, . . . **is even more disingenuous**. . . .
. . .
. . . **And the majority's concept of *stare decisis* ignores the force of binding precedent**."
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
Justices Stevens and Ginsburg, Dissenting

"If merely stating this alleged "equal protection" violation does not suffice to refute it, **our constitutional jurisprudence has achieved terminal silliness.**
. . .
The **Court's portrayal . . . is so false as to be comical**. . . .
. . .
. . . **What the Court says is even demonstrably false at the constitutional level**. . . .
. . .
Today's opinion has no foundation in American constitutional law, and barely pretends to. . . ."
Romer v. Evans, 517 U.S. 620 (1996)
Justices Scalia, Rehnquist and Thomas, Dissenting

"As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action . . . is seriously misguided. . . .

. . . **The Court inadequately explains its answer to the first question, and it avoids answering the second** because it concludes that its answer to the third disposes of the case. In my estimation, the Court's disposition of all three questions is most unsatisfactory."
Shaw v. Hunt, 517 U.S. 899 (1996)
Justices Stevens, Ginsburg and Breyer, Dissenting

"**The dissent's reading is flawed by its omission**."
Shaw v. Hunt, 517 U.S. 899 (1996)
Justice Rehnquist, Lead Opinion Footnote 8

23

THE CONFIRMATION HEARING OF U.S. SUPREME COURT JUSTICE CLARENCE THOMAS

The Judicial confirmation process and the Bar admissions process are very similar to the extent of the irrational nature of questions asked. In October, 1991 Clarence Thomas, who was nominated to the U.S. Supreme Court by George Bush testified before the Senate Judiciary Committee during his confirmation hearings. Unexpected surprise allegations of sexual harassment were made against him by Anita Hill, and the nation was glued to their television sets for several days watching the hearings. The hearings essentially degenerated to the point of being almost as bad as the State Bar admissions process. Thomas' very correct and appropriate statements about the manner in which he was treated during the process and the impact it had on the nation are equally applicable to Bar admission proceedings. I quote many of his courageous statements here at length. His statements make it undeniably clear that Judges are the first ones to condemn the types of tactics used during the Bar admissions or Judicial confirmation process, when they are the ones victimized by such unfair tactics. The only way to ensure that such injustice is discontinued with respect to the Bar admissions process, is to require all State Bar attorneys and Judges to regularly submit character information just like that required of Bar Applicants. Once they have to regularly submit character information, they will undoubtedly formulate a rational questionnaire. Clarence Thomas' statements capture the essence of the State Bar admissions process perfectly. These are the words he spoke during the congressional hearings on his nomination before the entire nation on national television (Letter headings delineate separate segments of hearing):

(A)

THOMAS : I think that this today is a travesty. I think that it is disgusting. I think that this hearing should never occur in America. This is a case in which this sleaze, this dirt, was searched for by staffers of members of this committee, was then leaked to the media, and this committee and this body validated it and displayed it at prime time over our entire nation. How would any member on this committee, any person in this room, or any person in this country, would like sleaze said about him or her in this fashion? Or this dirt dredged up and this gossip and these lies displayed in this manner? How would any person like it?

The Supreme Court is not worth it. No job is worth it. . . . I think something is dreadfully wrong with this country when any person, any person in this free country would be subjected to this.

. . . This is a circus. It's a national disgrace. And from my standpoint as a black American, as far as I'm concerned, it is a high-tech lynching for uppity blacks who in any way deign think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the US Senate rather than hung from a tree.

(B)

THOMAS : . . . Today is not a day that in my opinion is high among the days in our country. This is a travesty. You spent the entire day destroying what it has taken me 43 years to build. . . ." "The facts keep changing, Senator. When the FBI visited me, the statements to this committee and the questions were one thing. The FBI's subsequent questions were another thing, and the statements today as I received summaries of them were another thing. It is not my fault that the facts changed. . . .So, the facts can change, but my denial does not.

(C)

THOMAS : Senator, I would not want to . . . dignify those allegations with a response. As I have said before, I categorically deny them. To me, I have been pilloried with scurrilous allegations of this nature, I have denied them earlier, and I deny them tonight.

(D)

SEN. HATCH: And are you aware of why those statutes of limitations are so short?

THOMAS: I would suspect that at some point it would have to do with the decision by this body that either memories begin to fade or stories change or perhaps individuals move around and it would be more difficult to litigate them.

SEN HATCH: Well, it involves the basic issue of fairness, just exactly how you have described it.

(E)

THOMAS : This whole affair bothers me, Senator. I am witnessing the destruction of my integrity.

(F)

THOMAS : And I think that if you want to really be fair, you parade every single one before you and you ask them in their relationships with me whether or not any of this nonsense, this garbage, trash that you've siphoned out of the sewers against me, whether any of it is true. Ask them. They've worked with me.

(G)

THOMAS: Senator, as I indicated this morning, it just isn't worth it. The nomination isn't worth it, being on the Supreme Court isn't worth it. There is no amount of money that's worth it. . . . Being an associate justice of the Supreme Court will never replace what I have been robbed of. I wouldn't recommend that anyone go through it. . . .

I think the country has been hurt by this process. I think we are destroying our country, we are destroying our institutions, and I think it's a sad day when the US Senate can be used by interest groups and hate mongers and people who are interested in digging up dirt to destroy other people, and who will stop at no tactics when they can use our great institutions for their own political ends. We are gone far beyond McCarthyism. This is far more dangerous than McCarthyism. . .

(H)

THOMAS: . . . You are ruining the country. If it can happen to me, it can happen to anybody, anytime, over any issue. Our institutions are being controlled by people who will stop at nothing. They went around this country looking for dirt, not information on Clarence Thomas, dirt. Anybody with any dirt. Late night calls. Calls at work. Calls at home. Badgering. Anything. Give us some dirt. **(FN-Testimony Friday 10/11/91)**

(I)

SEN LEAHY: . . . Did you ever have a discussion of pornographic films with Professor Hill?

THOMAS: Absolutely not.

SEN. LEAHY: Ever had with any other women?

THOMAS: Senator, I will not get into any discussions that I might have about my personal life or my sex life with any person outside of the work place--

(J)

THOMAS: . . . One of the things that has tormented me over the last two and a half weeks has been how do I defend myself against this kind of language and these kinds of charges, how do I defend myself?

(K)

THOMAS: Senator, as I've indicated before, and I will continue to say this and believe this -- I have been harmed. I have been harmed, my family has been harmed, I've been harmed worse than I've ever been harmed in my life.

I wasn't harmed by the Klan.
I wasn't harmed by the Knights of Camellia.
I wasn't harmed by the Arian Race.
I wasn't harmed by a racist group.
I was harmed by this process. This process, which accommodated these attacks on me.
. . .
If someone wanted to block me because they felt I wasn't qualified, that's fine.
. . .
But to destroy me -- Senator, I would have preferred an assassin bullet to this kind of living hell that they have put me and my family through.

(L)

THOMAS: I don't think that I should be here today.
I don't think that this inquisition should be going on.
I don't think that the FBI file should have been leaked.
I don't think that my name should have been destroyed.
And I don't think that my family and I should have been put through this ordeal.
And I don't think that our country should be brought low by this kind of garbage.

(FN Testimony Saturday, 10/12/91-Morning)

(M)

THOMAS: . . . This issue was investigated by the FBI, then leaked to the press. And I do not share your view that this was not concocted.

(N)

THOMAS: . . . I will just simply say that these allegations are false. They were false when the FBI informed me of them. When they were subsequently changed to additional allegations, they were false. And they continue to be false.

(O)

SEN HEFLIN: . . . And the only thing that I'm asking you, Judge, is whether or not you refuse to answer any questions other than what may have occurred in employment. Do you continue to do that?

THOMAS: Oh, absolutely, Senator. I will not be further humiliated by this process. I think that I have suffered enough. . . . And I think enough is enough.

(P)

SEN. HEFLIN: . . . Well, let me just ask you these other things. This might have some bearing, it might not, but I think it should be asked. What was the date of your divorce?

THOMAS: I think it's irrelevant here, Senator.

. . .

THOMAS: . . . I will only discuss the allegations in this case. . . .

(Q)

THOMAS: . . . I did not expect this circus. I did not expect this charge against my name. I expected people to do anything but not this. And if by going through this, another nominee in the future or another American won't have to go through it, then so be it. . . .

(R)

THOMAS: . . . I don't think this is right. I think it's wrong. I think it's wrong for the country. I think it's hurt me and I think it's hurt the country. . . . And yet I sit here accused. And I'll never be able to get my name back. I know it. They day I received the phone call . . . that this was going to be in the press, I had -- I died. The person you knew, whether you voted for me or against me, died. My view is that that is an injustice.

(S)

THOMAS: As I indicated earlier, it is an injustice to me, but it is a bigger injustice to this country. I don't think any American, whether that person is homeless, whether that person earns minimum wage or is unemployed, whether that person runs a corporation or a small business, black, white, male, female, should have to go through this for any reason.

The person who appeared here for the real confirmation hearings believed that it was okay to be nominated by the Supreme Court and have a tough confirmation hearing. This person, if asked by George Bush today would he want to be nominated, would refuse flatly and would advise any friend of his to refuse. It's just not worth it.

(T)

THOMAS: Senator, I believe that someone, some interest group, I don't care who it is, in combination, came up with this story and used this process to destroy me.

(U)

THOMAS: . . . I didn't want my personal life or allegations about my sexual habits or anything else broadcast in every livingroom in the United States. . . . And hopefully it never happens to another American.

(V)

THOMAS: . . . And as I sit here on matters such as privacy, matters such as procedures for charges against individuals in the criminal context or civil context, this has heightened my awareness of the importance of those protections, the importance of something that we discussed in theory -- privacy, due process, equal protection, fairness.

24

THE SO-CALLED "JUDICIAL FUNCTION EXCEPTION"

Rather than adopting a fair and just definition of candor for everyone, the Judiciary chooses to impose an irrational standard on Nonattorneys. Fully aware that the standard cannot possibly be met by any human being, and not wanting itself to be subjected to an irrational standard, the Judiciary exempts itself from the scope of the standard's application. When a person enters law school, they begin to learn how the legal profession really functions. They are taught as a matter of "substance" how to lie when presenting a client's case to the Court. The entire concept of representing a client (advocacy) is predicated upon presenting the facts supporting the client's case in the light most favorable to the client, and failing to disclose material facts that are detrimental to your client's case. This concept relies entirely on the ability of the attorney to mislead the Court or Jury, about the importance, weight and materiality of the presented facts. These are "traditional trial tactics."

Stated simply, the very heart and soul of a lawyer's professional success is predicated on how well they can nimbly misrepresent, mislead, contort or hide the facts, law and evidence, while simultaneously demonstrating that they do so in furtherance of a genuine quest for truth. The prospective attorney learns that as a matter of practicality, the art of successful lying requires one to repeatedly emphasize the importance of truth. Essentially, the concept is that by giving maximum lip-service to truth, the attorney is not only allowed to lie, but is in fact <u>expected</u> to lie. Licensed attorneys and Judges are then personally protected from the consequences of their lies, by the manner in which the Judiciary strategically defines what constitutes a "lie." That definition notably excludes most conduct and actions of licensed attorneys and Judges, under the guise that such is incorporated within their duty of advocacy. It therefore is not a "lie." It is concededly a clever little manipulative game of word play that the Judiciary plays and demonstrates how the power to interpret law includes the power to evade law.

Since members of the Judiciary cannot possibly meet the irrational standard of candor which they unhesitantly impose on Nonattorneys, the Judiciary simply defines a "lie" in manner that excludes the scope of their own conduct from its' definition. The fact is that no human being on this earth can possibly meet their irrational, subjective character standard and the Judiciary realizes this. Such being the case, in order to protect itself, the Judiciary had to exempt itself from application of its' own character standards. They have done so in many forms. One is by determining that as a matter of law, misleading or false representations made by Judges in appellate opinions are not encompassed within the legal definition of a "lie." Another technique used, is known as the "Judicial Function Exception (JFE)." Federal statute 18 USC 1001 enacted by the U.S. Congress was revised in 1934. The statute criminalizes the following type of conduct:

> ". . . whoever shall knowingly and willfully falsify or conceal . . . a material fact, . . . in any matter within the jurisdiction of **any department** or agency of the United States. . . ."

In 1948, definitions associated with the statute, were adopted by Congress which read in part as follows:

> "The term "department" means one of the executive departments . . . **unless the context shows that such term was intended to describe the** executive, legislative or **judicial branches** of the government."

The question for consideration is whether the statute criminalizes the making of false statements or the concealment of material facts in judicial proceedings. The U.S. Supreme Court first addressed the issue in *U.S. v. Bramblett*, 348 U.S. 503 (1955). The Court held that the statute did in fact apply to the judicial branch of government stating:

> "It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section **shows that "department," as used in this context, was meant to describe the** executive, legislative and **judicial** branches of the Government."

What occurred next was nothing less than astounding. In 1962, the Federal Court of Appeals in the case of *Morgan v. United States*, 114 U.S. App. D.C. 13, 309 F.2d 234 (D.C. Cir. 1962) created the so-called "judicial function exception" to the statute. The case notably dealt with a person convicted of violating Sec. 1001 by holding himself out to practice law, even though he was not an attorney. It was a case dealing with the Unauthorized Practice of Law. The UPL rules as demonstrated previously herein form the basis of the State Bars' legal monopoly. It is therefore unsurprising that the so-called "judicial function exception" was first created in a case addressing UPL, as the exception itself is a protective measure that benefits the legal monopoly. In *Morgan*, the Defendant presented the brilliant argument that upholding his Sec. 1001 conviction, would mean that it would be a Sec. 1001 violation to engage in "traditional trial tactics," such as when a Defense Attorney makes a closing argument on behalf of a client he knows to be guilty. To evade Morgan's inescapable logic, the Court created the so-called "judicial function exception" that excluded "traditional trial tactics," from Sec. 1001. The Court then affirmed his conviction. The *Morgan* Court accomplished its' manipulative subterfuge by writing:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms "conceals or covers up." "

The impact of *Morgan* was an express, frontal assault to a Congressional enactment and the U.S. Supreme Court's opinion in *Bramblett*, which held that Sec. 1001 applies to the judicial branch. It was also a virtual blank check for attorneys and Judges to engage in the exact type of falsifications and concealments, which they regularly condemn when made by Nonattorneys. Notwithstanding the express language of the statute, the express language of the definitions section of the statute, and the holding of the U.S. Supreme Court, the Judiciary exempted "traditional trial tactics" by creation of an artificially concocted "judicial function exception." Subsequent to *Morgan*, almost every other Federal Circuit followed in adopting the so-called "judicial function exception."

As a matter of form, the U.S. Supreme Court's opinion in *Bramblett* was still binding law, but as a matter of substance, the Federal Courts of Appeal by engaging in deceptive manipulation and word play, had succeeded in evading and nullifying the *Bramblett* opinion. In 1967, the Sixth Circuit Federal Court of Appeals, expanded the scope of the so-called "judicial functions exception" by holding in *U.S. v. Erhardt*, 381 F.2d 173 (6th Cir. 1967) that Sec. 1001 was not violated by the submission of a false writing or false testimony in a criminal proceeding. The Court stated:

> "We hold that appellant's conviction under <Sec.> 1001 must be reversed . . . because <Sec.) 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding."

The *Erhardt* Court had expanded the "judicial function exception" and its' exemption from Sec. 1001 to include not only "traditional trial tactics," but also falsified evidence. The Sixth Circuit addressed the issue again in 1994. They diametrically reversed course. They determined in *U.S. v. Hubbard*, 16 F.3d 694 (1994), as follows:

". . . the judicial function exception does not rest on solid legal ground."

Under the Court of Appeals opinion in *Hubbard*, at least in the Sixth Circuit, the "judicial function exception" no longer appeared to provide safe haven for attorneys and Judges to render false or misleading statements or conceal material facts in judicial proceedings. This however jeopardized the ability of attorneys to engage in traditional trial tactics, zealous advocacy. It subjected them in fact, to the same type of irrational, subjective assessment of disclosure that is typically applied to State Bar applicants during the admissions process.

Faced with a split in the Circuits, as to whether the "judicial function exception" existed, the U.S. Supreme Court decided to revisit the issue. It granted Certiorari in *Hubbard*. The U.S. Supreme Court opinion in *Hubbard v. United States*, 514 U.S. 695 (1995) overruled *U.S. v. Bramblett*, 348 U.S. 503, (1955). Under the Supreme Court's opinion, as a matter of <u>form,</u> there was no longer any need for a "judicial function exception" to Sec. 1001, because the scope of Sec. 1001 was held to not include the judiciary branch at all. <u>They were now completely and totally exempt from Sec. 1001</u>. This was accomplished by holding that the term "department" did not include the judiciary. The effect was astonishingly that as a matter of <u>substance</u>, the scope of the "judicial function exception" was vastly expanded, by virtue of its' own elimination. It was simply relabeled.

The "exception" was eliminated on the ground that an entire branch of government was exempted from the rule. **One obviously does not need the benefit of an exception to a rule, when they are not covered in any manner by the rule itself.** Under *Hubbard*, every single falsification, every single concealment of a material fact, and every single dishonest action taken by a licensed attorney or Judge was now exempt from Sec. 1001. Prosecutors could still proceed against Nonattorneys, legislators and members of the executive branch of government for violating Section 1001 in non-judicial proceedings, or could proceed against falsification and concealments of fact if they were covered by other criminal statutes; but prosecuting an individual for a falsification in a judicial proceeding under Section 1001 was now out of the question.

What is the proper assessment of the U.S. Supreme Court's opinion in *Hubbard*? I submit there are two ways of assessing the opinion. First, it could be argued that the opinion was bad because it is unfair for falsifications of fact and concealment of facts to be criminal in nature when made with respect to the executive or legislative branch of government, but not the judicial branch. Such an argument relies on the premise that the judiciary is entitled to no exception from the law, whether such is phrased as previously as a "judicial function exception," or currently as a complete exemption from Sec. 1001 under *Hubbard*.

Alternatively, there is concededly some basis for asserting it was a good opinion. The reasons are as follows. The U.S. Supreme Court properly realized that the nature of advocacy <u>does</u> in fact require the licensed attorney to conceal material facts. The practice of law has always been like that. It is a key element of representation. The good attorney should never voluntarily provide full disclosure of material facts that are detrimental to his client's position. That would be a betrayal. Strict compliance by attorneys with Section 1001 is in fact, totally incompatible with the nature of the legal profession, traditional trial tactics and the nature of advocacy. Every attorney in virtually every litigation would be legally required to betray their client, if strict compliance with Section 1001 was required. How can we possibly require attorneys to disclose facts detrimental to their client's position? Although it is morally reprehensible to allow attorneys to conceal facts, it is also morally reprehensible to require attorneys to betray their clients by disclosing such facts. The issue therefore poses a Catch-22 ethical dilemma beyond resolution no matter what decision is made.

The only way to provide some justification for the Court's opinion in <u>*Hubbard*</u> , mandates focusing on the rights of Nonattorneys to receive zealous representation and zealous advocacy, rather than the attorney's ability to provide such by engaging in "traditional trial tactics." The two however, do obviously tend to go hand in hand. If the benefit to society of providing clients with zealous

advocacy is outweighed by the detriment to society of allowing attorneys to conceal facts, society benefits overall. However, it is unresolved whether the benefits do outweigh the detriments. I am doubtful, but not totally decided as to whether the Hubbard opinion was correct. I do know that any validity to the opinion hinges upon focusing on the Nonattorney's representational rights. That means the Judiciary must demonstrate that the exemption from Sec. 1001 that it has granted to itself is not attributable merely to a desire to satisfy its' own self-serving interest.

In many respects, the determinative factor is similar to the UPL issue, previously discussed herein. UPL prohibitions benefit the economic interests of the legal profession. That fact however, provides absolutely no justification for their existence. UPL rules are only justifiable if they benefit the public. For this reason, as discussed in a separate section of this book, there is an inverse relationship between UPL rules and State Bar admission requirements. Like UPL prohibitions, *Hubbard* also benefits the legal profession by exempting it from a congressional enactment. That fact however, provides absolutely no justification for the exemption. *Hubbard* is only potentially justifiable if it benefits the Nonattorney general public. Even then, its' ethical validity is doubtful.

The U.S. Supreme Court's *Hubbard* decision, intersects with the State Bar admissions process in the following manner. First, the Court's holding is in direct conflict with the irrational nature of inquiries included by State Bars on their applications. Stated simply, the vagueness, ambiguity, scope of time covered, and amount of detail currently required by Bar applications renders compliance with Section 1001's requirements an absolute impossibility for any human being. Similarly, the "traditional trial tactics" argument conflicts with the admissions process because it allows licensed attorneys to engage in concealment of facts that is not permitted of State Bar Applicants.

Focusing on the public's interest mandates that licensed attorneys and judges be held to a standard of moral character no lower than required of the Nonattorney Bar Applicant. This fact, is particularly critical in light of the leeway that the attorneys and Judges have been provided by the *Hubbard* decision. Society must ensure that the discretion provided by *Hubbard* is not abused, and this can only be accomplished by holding attorneys and judges to the same moral character standard required of Nonattorney Bar Applicants. This will ensure that the benefits enjoyed by attorneys and judges as a result of the *Hubbard* decision and UPL prohibitions, function for the primary purpose of enhancing the general public's interest. The failure to do so renders *Hubbard,* the Judicial Function Exception and UPL prohibitions illegitimate. In 1996, Congress enacted amendments to Section 1001, the effect of which was to reinstate the Judicial Function Exception and overrule *Hubbard's* exclusion of the judiciary from Section 1001. Kind of six of one, half dozen of the other. Whether called a Judicial Function Exception or an exclusion from the rule, the effect is largely the same. The revision to the statute by overruling Hubbard did reduce the degree of deception that attorneys and the judiciary can engage in back to its Pre-Hubbard level, but in light of the codification of the Judicial Function Exception the arguments presented herein are equally applicable.

25

WHEN A CONVICTION CARRIES NO SHAME and DISBARMENT BECOMES AN HONOR

The comedian Steve Martin used to tell a joke that inflation wasn't a bad thing because everyone would then be a millionaire. The obvious flaw in the theory is it does not recognize that if everyone is a millionaire, the buying power of a dollar is diminished. A loaf of bread that currently costs $ 2.00 would cost $ 50,000.00, give or take several thousand. No one as a matter of substance would really be richer, even though as a matter of form, we would all technically be millionaires.

Similarly, if the majority of citizens have a criminal conviction, the conviction does not carry any shame or disgrace. The intended concept of being convicted of a criminal act is that the "criminal" is supposed to be recognized as a really bad person, whereas the average citizen is respected. However, once laws are adopted prohibiting virtually everything, or are applied in an arbitrary manner so that anyone can be convicted for committing acts which are not violent, heinous, or harmful, the importance of being convicted of a crime is diminished.

If driving an automobile after drinking two glasses of alcohol constitutes a serious felony, it becomes irrationally equivalent to homicide which is also a serious felony. The effect of classifying both as serious felonies, diminishes the horrible nature of homicide by placing it on a level equivalent to driving after having two drinks of alcohol. Criminal convictions should be applied sparingly, so that they carry immense weight and detrimental impact upon those who are really guilty of serious crimes.

Currently, in this nation approximately one out of eight African-American males has a criminal conviction of some type. Consequently, being an African-American male means there's a pretty good chance you're a felon. It also means that applying the most basic principles of logic, African-Americans really shouldn't view having a felony conviction as all that bad of a thing, since so many people have them. If one African-American tells another African-American that they have been convicted of a crime, the recipient should logically interpret the communication as meaning, "well, maybe he committed a crime and maybe he didn't." It would have to be the logical response.

The issue however, is by no means limited to any minority group. It applies equally to the manner in which virtually everything a person does today, potentially subjects them to a criminal prosecution. The result is that the impact of having a Conviction has become immensely diluted. Due to the reckless manner in which legislators enact laws, the prevalence of prosecutions for relatively minor acts has diminished the importance of criminal convictions in our nation. There is something seriously wrong with irrational state legislators, when conduct that was completely legal 20 years ago, results in a lengthy prison sentence today.

When I was 19 years old, I went drinking at Bars regularly. It was totally legal and everyone I knew did the same thing. Today, a 19 year-old may wind up having a "Criminal Conviction" for doing the same thing. That's wrong. The matter is simply to trivial in nature to criminalize. That Conviction will "dog" that person relentlessly for years to come and can not help but breed disrespect for the law. Legislators need to come to the realization that they are not the Babysitters of society. They are wholly unfit to assume the role of moral guardian. As former U.S. Supreme Court Justice Jackson wrote:

> "It is not the function of the government to keep the citizen from falling into error, it is the function of the citizen to keep government from falling into error."

It is well known that many of our Presidents have at one time or another committed criminal acts. Similarly, many Justices of the U.S. Supreme Court at one time or another committed criminal acts. It is irrefutable that we have allowed the importance of the criminal conviction to become greatly diluted by prosecuting people and even sending them to prison for relatively trivial matters that in fact harm absolutely no one.

The launching of prosecutions for minor acts is then coupled with a failure of defense counsel to provide competent representation, resulting in a so-called "conviction." The theory of our criminal justice system is that one must be proven guilty beyond a reasonable doubt. As a matter of substance however, the mere charging of one with a crime typically is sufficient to obtain a plea bargain of guilt, even when the defendant is innocent. Such convictions must logically be construed as carrying no shame.

It must be remembered that legislators are not particularly bright individuals. They rarely consider whether the laws they enact will withstand constitutional scrutiny, and instead for the most part adopt an attitude of "we'll roll the dice and see what happens." The impact of such is that the courts are forced to sift through all of the laws to determine what is constitutional and what is not. Courts have essentially been forced into a position of becoming super-legislatures due to reckless legislators.

Consider the following hypothetical (which I do not believe is all that far-fetched in today's world.) A Legislature in some hypothetical state, (which we'll call "Oregon") adopts a law prohibiting every single conceivable act of any nature that a person could commit. Only two possibilities then exist. The first is that every single citizen in Oregon would be a felon, and therefore a felony conviction would obviously carry no shame. In fact, all of the Oregon felons could get together and joke about their convictions with each other. In such an instance, the legislature would have caused an immense harm to the societal interest, since citizens would be unable to set apart those individuals who were truly violent criminals. In substance, the most violent criminals would have become the beneficiaries of an irrational and foolish legislature that criminalized everything, thereby placing guilty individuals on a level equal to innocent people.

The second possibility under this hypothetical, is that the Oregon courts would have to sift through all the laws to determine which ones were constitutional. Through no fault of their own, they would be forced into deciding which laws citizens should be bound by, and which laws were unconstitutional. The result would be that the Legislature by virtue of its' own ignorant eagerness to assume authority in all areas, totally negated its' own power. The Courts would be deciding in every subject area what was legal, and what was illegal. The Legislative statutes would be rendered substantively meaningless.

Legislators as stated, are not particularly bright individuals. Laws in order to have the maximum degree of respect by both citizens and the courts, should only be enacted to prohibit those areas of conduct which are truly, irrefutably and undoubtedly viewed by most citizens as being criminal in nature. If there exists doubt about whether a law is constitutional, the chances are that it isn't. If it criminalizes conduct that was widely accepted as legal by society during the last several decades, it probably isn't constitutional. If violating a particular law doesn't result in actual harm to someone else, chances are the law is not constitutional. At some point, Legislators should catch on to the fact that the more laws they pass, the more power they transfer to the Judiciary, thereby diluting their Legislative authority.

The Judiciary is by no means absolved of guilt in these matters. We have entered an era where the State Bars vindictively impose so-called ethical discipline on attorneys who buck the system. State Bars consistently classify falsely the brave acts of attorneys by using the ambiguous phrase "prejudicial to the administration of justice." That is quite simply put, nothing less than a meaningless, garbage phrase. Ultimately, if the State Bars are themselves the ones acting in an "unjust" or unethical manner, then engaging in conduct inimical to their false definition of "justice," actually constitutes an act of morality and justice. When the most passionate lawyers are banned from the profession, for reasons

including but not limited to attacking the immoral conduct of the State Bars then Disbarment becomes an honor. When State Bars are proven to have used deceptive and unconstitutional investigation tactics characterized by a marked absence of due process and fairness, for the purpose of enhancing their own interests, Disbarment also becomes an honor.

It is a well-known premise of constitutional law dating back to Marbury v Madison, that the violation of an unconstitutional enactment is not an illegal act. Former Justice William O. Douglas of the U.S. Supreme Court once emphasized that citizens have a civic responsibility to violate unconstitutional laws when he wrote:

> "An ordinance -- unconstitutional on its face or patently unconstitutional as applied -- . . . . can and should be flouted. . . ."

I suggest the eager little, hypocritical Legislators begin thinking a bit more carefully about the laws they enact and whether they can sustain constitutional scrutiny, instead of trying to be moralistic Babysitters. Because the bottom line is that there are a lot of laws that are ripe for "flouting."

26

CONCLUSION

After more than six years of research and work on this topic, I have determined that the manner in which this nation's legal profession should function is as follows. Objective criteria and qualifications for entrance into the profession will be maintained, while subjective assessment will be eliminated to the extent possible. The requirement of receiving a three year law degree from an ABA law school will essentially remain unchanged, but their will be no differentiation in the number of credit hours required for graduation between part-time and full-time law students. Currently, part-time students are required to have more class hours for graduation in comparison with full-time students, which is ridiculous. The equalization of credit hours required will allow more people to attend law school on a part-time basis.

A moral character review process will be maintained for admission to the Bar which will for the most part be similar to that of all other professions. Typically, it will entail inquiring whether the individual has ever been convicted of a crime, or disciplined by a professional Board. Those individuals who correctly answer in the negative, will pass the character review and no admissions interview will be required. That is how virtually all other professions currently work. It is the standard our society has set for assessing each other. For the most part, if one person asks another “Have you ever been convicted of a crime?’ and the person answers “No,” then that person is typically considered an alright individual.

Individuals who have been convicted of crimes will attend a Bar admissions interview at which time further information related to the conviction may be obtained and determinative of whether to grant admission. The focus ultimately will be on convictions and not much else. It will be virtually impossible for an individual who has been convicted of a serious crime to gain admission to the Bar. I support a great deal of freedom and leeway for individuals to express themselves, but have absolutely no tolerance for individuals who resort to force or violence.

The MBE which is currently much too easy to pass will be made more difficult. The number of questions will be doubled, and the number of topics expanded. A large portion of the exam will be dedicated to American history. This will further the general public’s interest in ensuring that we do not have too many dumb attorneys running around, as is currently the case. It is well known that law and history are closely related. There will be no limit on reexaminations, as it is a treasured American value that “if you don’t succeed at first, try, try, again.” Partial credit will be given for sections passed during one sitting, so examinees may concentrate their study efforts on individual subject areas. This is similar to how the CPA exam currently functions, and the CPAs have always been smarter than the attorneys.

Since the exam will be longer and tougher, but with partial credit given for sections passed, only the most exceptional examinees will pass the entire exam in one sitting. Typically, two or more sittings will be required. The Essay exam will be eliminated because it allows the grader to subjectively assess the Applicant’s attitude and beliefs based on how and what they write. In its’ place, will be an objective examination on State law.

Law student registration will be eliminated. It’s never worked and was just designed to allow the State Bars to begin controlling the potential lawyer at an earlier stage. Probationary admissions will be eliminated. You’re either in or your out. No one wants to be represented by a half-attorney whose law license is hanging on a thread. Application fees to the Bar will be substantially reduced from their current exorbitant levels since lower costs will be incurred as a result of the curtailed character review

process. Lawyer assistance programs currently utilized by the State Bars to learn the vulnerabilities of their attorney members, will be eliminated. State Bars are licensing, not mental-help agencies.

Most importantly, licensed attorneys and Judges will be held to a higher standard of moral character and ethics in comparison with the Nonattorney Bar Applicant, rather than the beneficiaries of a lower standard as is currently the case. By equalizing the character review process between the initial application, and annual renewals of licensed attorneys, and then also subjecting licensed attorneys to the ethical rules of conduct, such is an inevitable result. The focus on disciplining licensed attorneys and Judges who engage in misconduct will be on the manner in which they represented their clients.

Considerations of how their representation affected financial interests of the State Bar will be ignored. Disciplinary committees will avoid using ambiguous, vague and subjective phrases such as "prejudicial to the administration of justice" during the disciplinary process, since they are just a transparent way of disciplining an attorney they don't like, even though the attorney did nothing wrong.

The focus will be on ensuring the litigants receive brave, competent and zealous representation. The detrimental effect of such on the economic interests of other attorneys or the State Bar will be a negligible consideration. The State Bar will be relegated to functioning primarily as a licensing and disciplinary agency, rather than a political organization. Correlated with this plan, UPL prohibitions will then serve a vital and greatly needed protection to the general public. As such they will be supported and respected by the general public, as well as myself.

The result of the foregoing will be that the Courts will have the general public's unwavering respect and trust. Their decisions in all other areas will be virtually unquestioned. That's the way I see it. And if I succeed, then that's the way it's going to be.

27

SPECIAL SECTION

THE OREGON STATE BAR - PLF

ETHICAL ATROCITY OR COMEDY ??

A Rebuttal to the False, Misleading and Deceptive Information Contained in the So-Called "OSB PLF Task Force Report" and Analysis of the Reasons Why the Oregon State Bar is the Least Trustworthy State Bar in the Nation

". . . in 1948 . . . I was invited to Portland to address the Oregon State Bar Association, which put me up at the Benson Hotel. When I checked out of the hotel, I was told that the bill had been taken care of by the association.

. . . Lindsay C. Warren, the Comptroller General of the United States . . . told me he had learned that I had been a guest of the Oregon Bar Association at the Benson Hotel in Portland, and that the association had not paid the bill but had routed it to a shipbuilding company that had a contract with the U.S. Navy. The contractor had in fact paid the hotel bill.

. . . I phoned the Benson Hotel to get the amount of the bill and immediately sent off a check in payment. I also wrote a letter excoriating the president of the Oregon Bar for doing anything that would link a member of the Court with such a highly unethical practice. . . ."

Autobiography of U.S. Supreme Court Justice William O. Douglas, *Go East, Young Man*, (p. 447)

"*The Bar's private interests in the very field in which it regulates - professional malpractice insurance - coupled with the lack of public accountability . . . reveals that the Bar presents a poor candidate for exemption from the active supervision requirement.*

. . .

Conspicuously absent from the majority's discussion is any acknowledgment of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. . . .

. . .

. . . . The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.

. . .

*. . .it would be a case of **fox-watching-the-henhouse** to conclude that these two Boards could provide meaningful supervision over the Fund."*

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989)
Dissenting Opinion, Justice Ferguson

"Remember how much more important it is to feed and cloth your family than it is to help a client with her particular problem"

Oregon State Bar, CLE Publication, Attorney Fees and Costs,
By Paul Saucy, Circa 1991-1994

*"While the "judgment acquisition" strategy **does not violate any laws** or legal ethics rules, it is still just plain wrong. . . .*

. . .

The State Bar has violated your trust. We are sorry."

Letter of Apology, President and President-elect Oregon State Bar, November, 1999

*"Whether the judgment acquisition strategy is legal in Oregon is **uncertain**. . . ."*

OSB PLF Task Force Report, IV(J); June 28, 2000

FINAL CONCLUSION REACHED IN THIS PAPER :

Of all fifty states in this Nation, none of which have ever been so foolish as to adopt a program such as the PLF, and specifically as a result of the PLF, Oregon currently has the least trustworthy State Bar in the country. Since the PLF causes judicial rulings to be based on the best economic interests of the Oregon State Bar, rather than the facts, law and evidence, there is a strong probability that currently in the State of Oregon there are massive numbers of innocent people who were wrongly convicted and imprisoned for crimes they did not commit. Similarly, there is a strong probability that currently in the State of Oregon there are massive numbers of guilty people who had criminal charges against them dismissed due to the PLF. As a result of the PLF, there is a minimal probability that the judgments reached in any civil, domestic or criminal matter in Oregon are reflective of the facts, law or evidence. Such is not the case in any other state of this nation. As correctly indicated in the Oregon State Bar's letter of November, 1999 the Oregon State Bar has violated the public's trust.

The Oregon State Bar – PLF
Ethical Atrocity or Ethical Comedy ?

In the entire nation, my research indicates that Oregon has the only State Bar with a mandatory policy requiring its' members to purchase malpractice coverage directly from the State Bar, through it's PLF (Professional Liability Fund). The same State Bar that is supposed to discipline its member attorneys for breaches of the ethical rules of conduct. It was created on July 22, 1977 by the State Bar Board of Governors and has for the last twenty years been the source of heated controversy and debate. The purpose of this article is to demonstrate that as a result of the PLF's existence, litigants in the overwhelming majority of both civil and criminal cases in Oregon, have an unconstitutionally and inordinately diminished likelihood of receiving fair adjudications or competent representation by Oregon attorneys.

The harm caused to the public interest by the PLF will be explained in detail. I will also review the history of the PLF including the numerous challenges made to it since its' inception and over the subsequent years. Principles of logic coupled with the most basic principles of human nature will reveal how the devious nature of the PLF illegitimizes the process of adjudication in Oregon. I will demonstrate how as a result of the foregoing the true and hidden purpose of the PLF was to enhance the power of the Bar over its' attorneys in order to allow the Bar to control litigation outcomes at the expense of the general public.

When the foregoing is proven, it will lead to the conclusion that in the long run, the PLF has in actuality been the Oregon Bar's Achilles Heel. Designed to be their greatest strength, it will ultimately prove to be their greatest weakness, for it diminishes the Bar's credibility. The reason is that the PLF concept is so unethically sound, that it will consistently be intellectually attacked by those aware of its' nature. The PLF will quite simply never escape constant intellectual bombardment, and controversial publicity. It will always be a source of resentment amongst Oregon legislators, the media, litigants, members of the general public and even OSB attorneys.

Eventually, the PLF will fall as a result. Since the Oregon State Bar (OSB hereafter) has relied so heavily on the PLF for over twenty years, when the PLF falls, the Oregon State Bar's power and respect will be greatly diminished. This article is organized as follows :

I(a). # GENERAL SUMMARY

In the mid 1970s a vast reform in the legal profession nationwide took place. Rules pertaining to the unauthorized practice of law were liberalized in many areas including divorce kits and self-help legal materials. Quite simply, the public was fed up with the profession, wanted change and got it. The reform was predicated in large part on the general dissatisfaction with the quality of legal services being rendered and the related cost. By liberalizing the legal profession and allowing litigants to have access to a greater amount of legal materials, the effect on the Oregon State Bar (and other Bars also) was a loss of power. This is because access to the Courts was more available to the general public.

Improving access for the general public had a corresponding related decrease in the "control of access" by the Bar. In addition, power was lost to the extent that lawyers who previously received fees for performing services, now faced having certain services performed by litigants on their own. Loss of fees, equals loss of money, equals loss of power. The key states that gave rise to this era of legal reform were Oregon, Florida, New York and Michigan. Why was Oregon such a key player in this era of legal reform? Perhaps because of the referendum process in Oregon which gives a greater degree of power and control to average citizens than in most states. In any event, the fact is that Oregon was the second state in the country (after New York) to expressly allow the sale of divorce kits, thereby liberalizing the practice of law and access of the Courts to the public.

In addition to liberalizing the definition of the "practice of law" at this time, the Oregon public was also demanding access to ethical complaints filed against attorneys. In 1975, the Oregon Legislature enacted its' public records inspection law that appeared to subject disciplinary files of the Oregon State Bar (OSB, hereafter) to public inspection. OSB vehemently opposed making the complaints public and the issue was finally decided by the Oregon Supreme Court in ***Sadler v. Oregon State Bar*** , 275 Or. 279, 550 P.2d 1218 (1976).

The dispute in Sadler began when journalist, Russell Sadler requested to inspect disciplinary files of Jason Lee who had recently defeated incumbent Oregon Court of Appeals judge, Jacob Tanzer in a bitterly contested election. Sadler petitioned the Attorney General to order the Bar to disclose the records. The Attorney General filed a request for an injunction in the Marion County Circuit Court compelling the Bar to permit inspection. It was denied and the Attorney General appealed. The case contributed to establishing the Marion County Court as a protectorate of the Bar , at the expense of the general public. It also initiated a long period of friction between that Court and the Attorney General's office. The Oregon Supreme Court faced with monumental negative publicity on the case, ultimately held that the attorney disciplinary files were public. Consequently, Oregon became one of only a handful of states that allowed public access to attorney ethical complaints. Oregon attorneys were now vulnerable.

Malpractice suits against Oregon attorneys at this time were soaring, and aggrieved litigants positions were significantly buttressed by the ***Sadler*** case. Litigants now had access to evidence concerning a lawyer's conduct that was previously unavailable. Such evidence provided aggrieved litigants with power to use against Oregon lawyers committing malpractice, because litigants could now combine resources. They could learn the identities of other litigants aggrieved by a particular attorney and consolidate their forces against the attorney. They could then all simultaneously present evidence of unethical acts committed by that attorney, thereby gaining a cumulative effect.

Basic human nature and logic dictate that people in litigation can be expected to use information available in a manner that helps their case most. As a result, Oregon attorneys were vulnerable to malpractice claims in a manner never before experienced and therefore had a motive to negate the impact of making attorney disciplinary complaints public. Oregon Attorneys were ripe for the taking. And they were pissed!

I.(b) DESCRIPTION OF THE PLF - The Zealous and Nonzealous Attorney

PLF stands for "Professional Liability Fund." It is a program enacted by OSB which requires all practicing Oregon attorneys to purchase malpractice (insurance) coverage directly from the State Bar. No option to decline is available to the attorney and a substantial premium is charged for the coverage. Any attorney who fails to pay the required premium has their professional license to practice immediately suspended. Obviously therefore, the attorneys generally pay.

The coverage provided is lesser in scope than normally provided under standard malpractice insurance policies offered by commercial companies. Since the Oregon attorney's premium dollars are required to be paid to OSB, very few elect to obtain additional coverage from other companies. Coverage purchased from other companies generally covers a wider scope of misconduct and would thereby offer an aggrieved litigant a greater chance to recover insurance dollars.

Although coverage by the PLF is "de minimis" and negligible in scope, it is virtually identical in nature to malpractice insurance coverage provided by commercial carriers. The primary distinction is the blatant and atrocious conflict of interest that exists by imposing a mandatory policy of purchasing the coverage from the Bar. Notwithstanding that the coverage is virtually identical in nature to malpractice insurance, OSB stubbornly refuses to recognize the PLF and its' coverage as being "insurance." By doing so, OSB succeeds in evading the law pertaining to insurance companies. In essence, any commercial carrier that wants to sell malpractice insurance to Oregon attorneys is subject to a wide spectrum of regulations that do not apply to the PLF. Presumably, those regulations were designed to protect and foster the public interest.

In fact, the PLF arrogates itself to be so bold as to assert that even though a mandatory policy of purchasing the insurance is imposed on Oregon attorneys, with the stipulation that they lose their professional license if they don't purchase it, the PLF contract with the attorneys does not deprive the attorney with the opportunity to bargain. The phrase "contract of adhesion" is normally used to identify a contract where the weaker party generally has no ability to bargain, and no realistic choice as to the contract terms. In essence, where one party is so much stronger than the other, that they have the ability to take advantage of the other party. OSB states as follows :

> "Traditionally, insurance contracts have been subject to court interpretation construing all ambiguities against the author of the form. However, not all insurance contracts are treated as contracts of adhesion. . . . The developers of the Plan have received substantial input directly from the membership. It is accordingly inappropriate to treat this Plan as a contract of adhesion."
>
> (Section 6 - PLF - 1997 Claims Made Plan)

Throughout this article I will use the phrases "Zealous" and "Nonzealous" to describe Oregon attorneys. What I mean by these terms is as follows. A Nonzealous attorney is one that supports the economic, anticompetitive interests of the Oregon State Bar, even at the expense of the public and the litigants. Such attorneys will be amenable to waiving procedural objections and betraying their clients, even if in doing so they are not in compliance with the law, ethical rules of conduct, or notions of justice.

A Zealous attorney is one that exemplifies the cherished notions of justice, fighting on behalf of their client, and promoting the adversarial legal process even at the expense of the State Bar's economic interests. Obviously, the Zealous attorneys are typically better and are characterized by the fervent passion for justice, while the Nonzealous attorneys who support State Bar economic interests are typically bumbling and stumbling with respect to legal knowledge. They become successful attorneys by becoming card carrying members of what has become pervasively known amongst the public as the "Good Ol' Boy Network" or "Club."

The concept of the Zealous and Nonzealous attorney has manifested itself in Oregon via a controversial "Statement of Professionalism." Ostensibly designed to promote "professionalism" amongst attorneys, it is in truth a mandate for selling out clients in order to promote the economic interests of the legal profession. The concept is to promote Nonzealous conduct by Oregon attorneys. If the Bar can convince the public that these notions of professionalism are in the interest of improving the legal profession for their benefit, the Bar can solidify its control and power over attorneys, litigation outcomes and the litigants.

As a general rule, when considering the legitimacy of judicial notions, use of the term "informally" has a negative connotation. It manifests a willingness to do things outside the scope of validly enacted rules. The following excerpts from the Statement of Professionalism are particularly disturbing in the manner they promote the concept of the Nonzealous attorney at the expense of the public and the litigants :

> "1.11 We will avoid unjust and improper criticism and personal attacks on opponents, judges, and others . . . ."
>
> "1.16 We will honor the client's right to our candid view of opposing counsel only to the extent that those views are relevant . . . not for the purpose of disparaging other counsel."
>
> "2.5 . . . if possible, before a responsive pleading is due, we will try to initiate **informal** discussions with opposing counsel . . . . We will try to reach agreement for scheduling of future motions, discovery, pretrial conferences, and other matters . . . .
>
> "2.6 . . . We will try to schedule depositions **informally** by mutual agreement . . . before resorting to formal notice procedures.
>
> "3.3 We will avoid quarrels over matters of form or style . . . ."
>
> "4.5 We resolve to employ all the organizational resources necessary to assure that the legal profession is effectively regulated from within."

The Oregon Supreme Court then issued an "Order" in support of the purported "Statement of Professionalism" that is nothing short of incredible. It demonstrates why litigants constantly feel they are being sold out by their attorney in favor of the "good ol'boy network" and "Club." The Oregon Supreme Court "Order" states:

> "The Supreme Court of Oregon is committed to the highest standards of professionalism and expects those standards to be observed by lawyers in this state. . . . Secondarily, compliance depends upon **reinforcement by peer pressure** and public opinion, and finally, when necessary, by enforcement by the courts through their powers and rules already in existence."

Reinforcement by "peer pressure?" That's crap. The Oregon Supreme Court has stated in no uncertain terms that lawyers are to "play ball," with opposing counsel. They <u>want</u> Nonzealous attorneys, and therefore they will penalize Zealous counsel. The PLF contributes by solidifying the Bar's stranglehold on Oregon lawyers.

Control the attorney, and you control the litigation outcome. Control litigation outcomes and you control the general public. The PLF works as follows. OSB leverages the attorney by threatening the attorney's license unless the attorney forks over dollars for malpractice coverage. They therefore gain control of that attorney to an extent greater than in any other State. They then have an increased

ability to make Nonzealous attorneys virtually immune to a successful malpractice claim. The attorney having lost control of his independence, must remain supportive of State Bar economic interests, and other Nonzealous attorneys. The attorney's loss of independence diminishes his incentives to zealously represent litigants.

II. OSB's STATEMENT of the PLF's INTENDED PURPOSE

There are essentially two statements of the PLF's purposes and mission. One was designed to get the enacting legislation passed, and the second is the real one. It can be fairly assumed that if OSB proposed to the public that the PLF was enacted for the purposes of making Oregon Attorneys virtually immune to a malpractice claim and enhancing the power of the State Bar over its' attorneys and litigation outcomes, without regard to the negative impact on the quality of representation received by litigant, the PLF would not have had much of a chance from the start.

OSB therefore needed an initial Statement of Purpose that accomplished two effects. First, it had to hide the true intended purpose and second, it had to have an appealing sound to the public. What they came up with is stated in the Section 6 History Section of the 1997 Claims Made Plan Document and reads as follows:

> "The object of this program was to provide mandatory coverage at minimum cost to attorneys **while assuring the public** that each attorney in private practice would have certain minimum levels of protection. The determination of the scope of the protection afforded by the PLF was to be determined by the Board of Governors."

In the next section, I will explain why the PLF constitutes a "**Net Harm**" to the public interest rather than furnishing a "**minimum level of protection**". Before doing so however, I point out something interesting that I came across. On February 2, 1999 I visited the American Bar Association's web site. It contained an article on Law Practice Management by State Bars. Included in it was a survey of some existing programs, including that of the Oregon State Bar. The ABA section on the Oregon State Bar contained a "STATEMENT OF MISSION" about the PLF. It read as follows :

> "**STATEMENT OF MISSION:** The mission of the Professional Liability Fund **is to manage for the Oregon State Bar**, the legal malpractice liability program at the least possible assessment consistent with sound financial condition, superior claims handling, efficient administration, and effective loss prevention."

Where's the part about "assuring the public that each attorney in private practice would have certain minimum levels of protection?" It doesn't even appear in the ABA's Statement of Mission about the PLF. In fact, the public interest is not even mentioned or alluded to. I later learned that apparently, subsequent to 1997, the Oregon Bar deleted any reference to the public interest.

The purpose of the PLF has always been for the Oregon State Bar, not the public. The State Bar only feigns concern about the public interest when it needs to get enacting legislation for its benefit passed, or when it is under political attack from the media or general public.

III. ANALYSIS of the "NET" MONUMENTAL HARM to the PUBLIC INTEREST CAUSE by the PLF

OSB asserts the PLF affords the public with "certain minimum levels of protection." I contest the assertion and instead submit that the PLF harms the public interest when considering all factors. The phrase "certain minimum levels of protection" when applied to the public interest, encompasses two elements which are as follows :

1. The extent to which a litigant who is the victim of malpractice by their attorney will be able to recoup amounts as a result of the PLF's coverage for that attorney.

2. The extent to which all other factors associated with the PLF will protect or harm litigants.

OSB in using the phrase "certain minimum levels of protection" conveniently chooses to recognize only (1) above. To determine the overall effect however, (1) above must be "netted" against (2) above to determine whether when all factors involved are considered, the public is protected or harmed. To consider (1) above and disregard the impact of (2) would be equivalent to walking up to a person and saying, "I'm going to protect you." At which point, you give him an umbrella to protect him from raindrops falling, and then immediately proceed to kick him in the leg, and then punch him in the arm. Undoubtedly, you have given him a "de minimis" amount of protection with the umbrella, but the overall effect is a "net harm" when combined with the kick and the punch. The umbrella would be (1) above. The kick and the punch would be (2) above.

I do concede that (1) above considered by itself in a wholly isolated vacuum, provides a "de minimis and virtually negligible amount of protection." Obviously though, consideration in a vacuum can not be considered appropriate. (1) above which is de minimis in nature, is so vastly overwhelmed by other factors incorporated in (2) that the equation when considered in full results not only in "no protection," but rather a "negative protection" (i.e. a "harm"). OSB has in essence given the public a "kick." And it wasn't in the leg.

The "**Harm**" to the public interest manifested in (2) above includes, but is not necessarily limited to the following factors, each of which will be explained in detail :

1. Oregon lawyers are aware if they represent victimized litigants in malpractice suits they will cost OSB money.

2. Oregon lawyers have an incentive to ignore procedural defects since if they successfully contest defective pleadings, opposing counsel may be sued for malpractice thereby costing OSB money.

3. Competent Pro Se litigants who have no incentive to get along with opposing counsel represent an economic threat to OSB. As a result, Pro Ses are unjustly branded as enemies of the Oregon Bar, thereby depriving them of fair and impartial trials in virtually every instance in Oregon.

4. The result of the PLF is attorney discipline for zealous and competent representation, and an absence of discipline for unethical conduct.

5. Judges have economic incentives to rule against Zealous attorneys, and to rule in favor of Nonzealous attorneys. The probability of Zealous attorneys being sued for malpractice or subjected to discipline is thereby unjustly increased.

6. Judges have an incentive to exclude evidence and deny motions of victimized litigants suing an attorney for malpractice, in order to increase the probability they lose.

7. Attorneys who are Nonzealous even at the expense of litigants, may reap the rewards by representing the PLF.

8. Conduct covered by the PLF is virtually negligible. Since Oregon attorneys are required to purchase coverage from OSB, very few elect to purchase additional coverage from commercial companies. To the extent, they would have purchased coverage from commercial entities with wider scopes of coverage, the victimized litigant has a lower probability of recovery.

9. Pursuant to DR 1-202, (Disciplinary Rule) an Oregon attorney possessing knowledge of misconduct of another attorney is required to report such to the appropriate professional authority. But PLF attorneys are exempt from the rule.

10. Zealous counsel is not provided to litigants in Oregon. Judicial decisions are based on financial incentives rather than the law, facts or evidence.

ANALYSIS :

1. OREGON LAWYERS ARE AWARE IF THEY REPRESENT VICTIMIZED LITIGANTS IN MALPRACTICE IN SUITS THEY WILL COST OSB MONEY

Historically, in this nation in all states, it has been very difficult to get any attorney to sue another attorney for malpractice. It takes a spirit-minded, independent attorney to accept such a case. By suing other attorneys, they in essence alienate themselves from the profession. They are treated in many respects as outcasts, although they perform a needed and valuable public service. In the absence of a PLF, the prospects for an aggrieved litigant to find an attorney to just take their case for malpractice against their old lawyer, are already bleak. The PLF harshly exacerbates, an already dismal environment for the individual who is the victim of lawyer incompetence or misconduct.

If an Oregon lawyer represents a litigant suing another Oregon lawyer for malpractice, his representation not only results in alienating himself from the legal profession in a manner similar to other states, but he additionally must face the "reinforcement by peer pressure" that may surmount against him for exposing his own State Bar money to financial liability. Whether the malpractice claim fails or succeeds, the PLF will have to pay to defend itself. OSB Lawyer #1 represents Client suing Lawyer #2 who is covered by the PLF. PLF must spend money to hire counsel to defend. Lawyer #1 by agreeing to represent Client has in essence cost OSB money whether he wins or loses. Basic human nature dictates that when you cost a person or entity money, they will not be "Friendly" towards you. Often they will seek to get even.

Lawyer #1 is at risk of retaliation from OSB in the future for trying to help the litigant victimized by an Oregon attorney. OSB licenses Lawyer #1 and therefore has the perfect means available for getting even at its' disposal. Potential Lawyer #1s are aware of this. As a result, Lawyer #1s are virtually nonexistent in Oregon and aggrieved litigants are helplessly unable to find counsel in attorney malpractice suits.

2. OREGON LAWYERS HAVE AN INCENTIVE TO IGNORE PROCEDURAL DEFECTS SINCE IF THEY SUCCESSFULLY CONTEST DEFECTIVE PLEADINGS, OPPOSING COUNSEL MAY BE SUED FOR MALPRACTICE THEREBY COSTING OSB MONEY

If an attorney misses a filing deadline, fails to object, allows the statute of limitations to lapse, fails to plead an essential element of a case, mis-cites a case or commits any other of a myriad of errors, it can constitute malpractice. Normally, this would result in the commercial carrier of malpractice insurance being potentially liable. In Oregon, it will result in OSB being potentially liable through the PLF. What this means is that an Oregon lawyer places the PLF at risk of being held liable, each time they object to the motions or pleadings of opposing counsel.

A basic premise of human nature is that most people will do what is best for themselves and their family. Such being the case, the Oregon lawyer in looking out for himself and his family, has an incentive to ignore valid procedural arguments that could be advanced for a client. This is particularly true when the client is not aware of the intricacies of legal procedure and won't even know the argument could have been advanced. The ultimate result is that an attitude is adopted amongst Oregon lawyers to the effect of :

> "If you don't point out my errors, I won't point out yours. Then we'll both make the Bar happy regardless of how the case comes out."

Those who buck the unwritten understanding, are deemed to be "Bar Unfriendly" and subject to the disciplinary consequences of such a label.

3. COMPETENT PRO SE LITIGANTS WHO HAVE NO INCENTIVE TO GET ALONG WITH OPPOSING COUNSEL REPRESENT AN ECONOMIC THREAT TO OSB. AS A RESULT, PRO SEs ARE ESSENTIALLY BRANDED AS ENEMIES OF THE OREGON BAR, THEREBY DEPRIVING THEM OF FAIR AND IMPARTIAL TRIALS IN VIRTUALLY EVERY INSTANCE IN OREGON

I have thus far pointed out some of the reasons why the PLF creates an environment that is not conducive to the adversarial process that is necessary for effective representation during litigation. Instead, it creates a "get along" and "don't rock the boat" attitude amongst Oregon lawyers that compromises the best interests of the litigants and causes valid procedural arguments to often not be made.

Now, there's a wrench thrown into the finely tuned piece of machinery known as the PLF. Pro Se litigants (litigants who represent themself). First, I digress a bit. Pro Ses in all states are detested by attorneys and Judges. Their is an old saying that :

"A man who represents himself has a fool for attorney."

The saying should more appropriately be phrased as follows :

> "A man who represents himself, no matter how competently and diligently, will generally be treated as a fool by Judges and attorneys who perceive that by representing himself the man is depriving the profession of legal fees. Consequently, all steps must be taken by Judges and attorneys to ensure that the Pro Se loses, even when he is right. In this manner, he will appear to be a fool, fewer people will conduct themselves Pro Se and the lawyers will make more money."

Having now stated my general viewpoint, I further assert the following. Even if my above stated viewpoint is incorrect regarding Pro Ses, and assuming arguendo that they are indeed truly fools, they still have representation better than provided by licensed Oregon attorneys.

Pro Se litigants pose a unique problem for OSB. Already detested as in other states, they represent an additional economic threat to the PLF. Unlike the Oregon lawyer who has adopted the "get along" attitude, the skillful Pro Se will raise every single valid procedural objection against opposing counsel. The Pro Se will not waive deadlines, and will be waiting at the courthouse door before it opens in order to obtain a default judgment. When successful in doing so, opposing counsel is exposed to a malpractice claim, and the PLF is at risk of having to spend money to defend the claim. The result is that Pro Se litigants are intensely despised by attorneys and Judges in Oregon, in a manner uncomparable to any other state. They wear the badge of the Pro Se which works against them to begin with, because they deprive the legal profession of fees by representing themself. They then function as a potential double whammy regarding malpractice claims that may have to be defended at State Bar expense.

The final result in Oregon is that when one party in a litigation is Pro Se, miniscule issues of procedure that can be used against a Pro Se litigant, by a Bar Friendly attorney, are given an unreasonably heightened degree of importance by the Judges, if the Pro Se is lacking in legal knowledge. In such instances, procedure takes precedence over substance, so that the Pro Se may be unfairly taken advantage of. Conversely, if the Pro Se is legally skilled, issues of procedure become wholly and absolutely disregarded even at the expense of doing insult to justice. In fact, the Pro Se's mere raising of such arguments in a proper and respectful manner, functions to antagonize the irrational, hyper-emotional sensitivities of the trial judge.

4. THE RESULT OF THE PLF IS DISCIPLINE FOR ZEALOUS REPRESENTATION AND AN ABSENCE OF DISCIPLINE FOR UNETHICAL CONDUCT.

Excluded from coverage under the PLF are unethical acts committed by an attorney. (1997 Claims Made Plan, p.325). This means that if a client suffers a loss due to the unethical acts of his own attorney, the client will not be able to recover from the PLF. It is well known that malpractice and ethical misconduct often go hand in hand. It is a relatively rare instance when malpractice is not accompanied by a breach of some ethical rule. In particular, the ethical rules ostensibly and purportedly require an attorney to "zealously" represent the interests of his client. Failing to do so is often a chief cause for an attorney malpractice lawsuit.

The result of the foregoing provision, is quite simply and blatantly that OSB can relieve itself of monetary liability simply by disciplining the attorney. Once again basic human nature dictates that people will generally do what is to their best financial benefit. OSB will thus determine what is to its' "best financial benefit" in dealing with an attorney accused of ethical misconduct by weighing two competing factors which are as follows :

1. The amount of money that will be saved by the PLF if the attorney is disciplined.

2. The extent to which the particular attorney in question, is of value to the Bar as determined by the extent to which he is friendly and supportive of the Bar.

Based on the analysis, financial considerations will dominate the Bar Disciplinary committee's determination as to whether the accused attorney should be disciplined. A blind eye will be turned with respect to unethical acts committed by attorneys who contribute and are supportive of OSB, while attorneys who have committed no unethical act will often be disciplined. The public is further harmed to the extent that attorneys who commit malpractice, would have purchased other commercial insurance that covered the commission of unethical acts, if not required to purchase PLF coverage, under threat of losing their law license.

5. JUDGES HAVE ECONOMIC INCENTIVES TO RULE AGAINST ZEALOUS ATTORNEYS, AND TO RULE IN FAVOR OF NONZEALOUS ATTORNEYS. THE PROBABILITY OF ZEALOUS ATTORNEYS BEING SUED FOR MALPRACTICE OR SUBJECTED TO DISCIPLINE IS THEREBY UNJUSTLY INCREASED.

Following the same line of reasoning in (4) above, the trial process itself is affected. When an attorney fails to assert a procedural matter, it can constitute malpractice. If an attorney has a pleading dismissed due to a procedural defect, it can constitute malpractice. The impact is that the rulings of the trial judge likely determine whether a party's counsel becomes liable for malpractice. If the Judge renders a ruling in a manner that exposes counsel to malpractice, he may in fact be costing the Bar money.

Basic human nature dictates that people do not like when others take action that costs them money. The political support of Bar members is critical to a Judge sustaining his position in office. The Judge therefore has an incentive to render rulings in a manner that will not cost the Bar money, in order to gain political support from Bar members.

This incentive dictates that the Judge should overrule valid procedural objections raised against a Nonzealous attorney, and sustain objections raised against a Zealous attorney**. In the event a Nonzealous attorney raises an objection against another Nonzealous attorney, a somewhat unique situation exists. The issue can actually be decided on its merits.** Otherwise, it takes a truly exceptional and strong Judge to buck his Bar, since it may be at the expense of his position. Naturally, if you're a Pro Se raising valid procedural objections against a Nonzealous attorney you don't have a

snowballs chance in hell of having it sustained. Such a situation does not exist in any other state. In other states, while the Judge may be swayed by varying concerns, he does not need to address whether denying or granting a motion will result in a malpractice claim that will expose his Bar financially.

6. JUDGES HAVE AN INCENTIVE TO EXCLUDE EVIDENCE AND DENY MOTIONS OF VICTIMIZED LITIGANTS SUING AN ATTORNEY FOR MALPRACTICE, IN ORDER TO INCREASE THE PROBABILITY THAT THEY LOSE

As stated above, the Judge in order to maintain his position requires the support of OSB members. The Judge therefore has a personal incentive to conduct himself in a manner that will foster such support. Support is fostered when he does not expose his Bar financially. Such being the case, a Judge adjudicating an attorney malpractice claim, has an incentive to render his rulings based on how they will affect OSB. Stated succinctly, malpractice claims must lose or OSB will often pay the price. Once again, such a situation does not exist when the malpractice coverage is provided by commercial insurers.

7. ATTORNEYS WHO ARE NONZEALOUS, EVEN AT THE EXPENSE OF LITIGANTS, MAY REAP THE REWARDS BY REPRESENTING THE PLF.

When the PLF does cover a claim they have to hire somebody. Naturally, they will hire an attorney who supports the economic interests of the Oregon Bar, since the PLF is a division of the Bar. Be friendly and supportive of your local Bar and maybe you'll earn some legal fees. Being friendly and supportive of your Bar includes most particularly supporting the PLF. Don't file procedural objections because that could cost OSB money. Don't accuse opposing counsel of misconduct if they are supportive of State Bar economic interests because that could also cost OSB money. If your client instructs you to do so, tell your client they are being unreasonable and irrational, even though in fact it is the Oregon attorney who is really being irrational.

8. CONDUCT COVERED BY THE PLF IS VIRTUALLY NEGLIGIBLE. SINCE OREGON ATTORNEYS ARE REQUIRED TO PURCHASE COVERAGE FROM OSB, VERY FEW ELECT TO PURCHASE ADDITIONAL COVERAGE FROM COMMERCIAL INSURANCE COMPANIES. TO THE EXTENT, THEY WOULD HAVE PURCHASED COVERAGE FROM COMMERCIAL ENTITIES WITH WIDER SCOPES OF COVERAGE, THE AGGRIEVED LITIGANT HAS A LOWER PROBABILITY OF RECOVERY

The actual coverage provided to an Oregon attorney is "de minimis" in nature. Logic dictates that an attorney has a limited amount of dollars available for the purchase of malpractice insurance. Once those dollars are required to be expended on purchasing a PLF policy, they are unavailable for alternative modes of coverage that would be more comprehensive in scope. The public is harmed to the extent that Oregon attorneys would have purchased malpractice insurance from commercial companies with scopes of coverage wider than the PLF. Aggrieved litigants suffer to the extent they are unable to recover insurance dollars due to an exclusion from coverage of the PLF, if such an item would have been covered by a commercial insurance policy purchased by the attorney. In this regard, I would note that I am quite in favor of a policy requiring practicing attorneys to purchase malpractice insurance. Such a policy if implemented properly can help, rather than harm the public. The harm occurs when the insurance must be purchased from the Bar. A moderate amount of harm occurs when even an optional policy is available from the Bar. The Bar simply should not be in the business of providing malpractice insurance to the same members it is supposed to discipline.

9. PURSUANT TO DR 1-202 AN OREGON ATTORNEY POSSESSING KNOWLEDGE OF MISCONDUCT OF ANOTHER ATTORNEY IS REQUIRED TO REPORT SUCH TO THE APPROPRIATE PROFESSIONAL AUTHORITY. BUT PLF ATTORNEYS ARE EXEMPT FROM THE RULE

The obvious result is a diminution in the overall character of the Bar itself, as evidenced by a clear and apparent hypocrisy dominated by monetary interests. There could not possibly be anything more hypocritical. OSB has arrogated itself to being so bold as to exempt the specific class of attorneys that is responsible for fostering their financial interest, from one of the most important ethical rules of conduct.

10. ZEALOUS COUNSEL IS NOT PROVIDED TO LITIGANTS IN OREGON. JUDICIAL DECISIONS ARE BASED ON FINANCIAL INCENTIVES RATHER THAN THE LAW, FACTS AND EVIDENCE

Largely as a result of the 9 foregoing "HARMS," it indicates how the basic value of justice has been compromised in Oregon in a manner applicable to no other state in the nation. The practice of law has enough problems nationwide, that it should at least not have to deal with a blatantly hypocritical program designed to foster the interests of the licensing agency at the expense of zealous representation to the public.

IV. A HISTORY of CONTROVERSY with the PLF and OSB DISCIPLINE

Since its' inception the PLF has been a source of tremendous controversy. This controversy extends well beyond even the legitimacy of the PLF itself as indicated by the following line of cases. The first case reveals the extent to which OSB will go to fortify its' subjugation of attorneys, and how the process of ethical discipline is affected and utilized to advance the Bar's monetary interest.

A. STATE ex rel Robeson v. OREGON STATE BAR, 291 Or. 505 (1981)

Oregon attorney, Vincent Robeson was suspended from the practice of law on May 18, 1981 for failure to pay his PLF assessment. Mr. Robeson seeking reinstatement to the Bar and showing an admirable degree of spunk in my opinion, then obtained in Federal District Court a preliminary injunction against the State Bar's Board of Governors. The Bar just had to absolutely love that. Enter the "get even" with a Zealous attorney factor. The Federal injunction ordered the Bar to temporarily reinstate him and also ordered Robeson to petition the Oregon Supreme Court. The injunction stated expressly as follows :

> "IT IS HEREBY ORDERED that the Board of Bar Governors temporarily reinstate plaintiff. Plaintiff is ordered to petition for permanent reinstatement in the Oregon Supreme Court as a condition precedent to this temporary reinstatement. All further matters in this court shall be stayed pending resolution of the plaintiff's petition in the Supreme Court."

Robeson then filed the required petition with the Oregon Supreme Court. In his petition, Robeson attacked the validity of statutory suspension for nonpayment of the PLF assessment on the ground that it was a usurpation of the State Supreme Court's authority to regulate the admission of attorneys. The PLF suspension factor as described previously is the key element to the Bar's control over the attorneys. Without it, PLF is nothing and Oregon attorneys would not be relegated to subservience.

Secondly, Robeson asserted that the rules of procedure for reinstatement unlawfully delegated power reserved to the courts to the Oregon State Bar. Thirdly, Robeson attacked the Bar on the grounds they were in violation of the 14th amendment due process clause. Robeson had raised the stakes. It was now not only a question of the PLF's validity, but also of the State Bar's very existence.

OSB naturally believed this troublemaker had to be neutralized. **They took an incredibly risky step from a public relations and political standpoint to accomplish such.** Bar counsel submitted to the State Supreme Court a letter that stated in part as follows :

> "On June 19, 1981, Mr. Robeson submitted his reinstatement application to the Bar office. The Board of Governors . . . held a conference call meeting on the very day Mr. Robeson's application was submitted . . . . During the course of the discussion over Mr. Robeson's application, it was brought to the attention of the Board of Governors that a formal disciplinary proceeding was then pending against Mr. Robeson (No. 79-22) and that the **trial board appointed in that disciplinary matter had rendered its decision that very day**. In light of the trial board findings that Mr. Robeson had violated a number of disciplinary rules, it was the decision of the Board of Governors to table consideration of Mr. Robeson's application."

Wow!! An attorney who is making waves is disciplined on the exact same day his reinstatement application is being considered. Must have just been a complete coincidence. Based in part on the fact that disciplinary action had now been taken against Mr. Robeson for matters wholly "unrelated" to the PLF assessment, Robeson's petition for reinstatement was then denied by the State Supreme Court. In its' opinion the Court stated as follows in regards to the PLF :

"We have no doubt that the due process clause does not foreclose making the practice of a profession contingent on maintaining adequate arrangements for making good financial losses caused to clients . . ."

The obvious problem with the statement is that the PLF provides only "de minimis" coverage in relation to commercial insurers and deprives litigants both of fair trials and zealous representation. It is not intended as an "arrangement for making good financial losses caused to clients." It is intended as a vehicle to subjugate the attorneys and the interests of the clients, to those of the State Bar.

B. OSB BAR BULLETIN - OCTOBER 1983

The monthly magazine of the Oregon Bar is the Bar Bulletin. In October, 1983 the Oregon Bar Bulletin on pages 17 and 19, published the following, ostensibly diametrically opposed submissions from two different Oregon attorneys

"I have grave concerns about the performance of the Professional Responsibility Board. Lawyers who, in my opinion are clearly in violation of the canons and disciplinary rules, are being allowed to continue to practice law in the state, either because of the PRB's inaction or inattention paid by the PRB to complaints filed."

"I am becoming more and more distressed by some of the disciplinary decisions I see in the Bulletin each month. Some seem very picky to say the least. I have talked to several attorneys about the current state of affairs recently and all seem to share the views I hold: namely,

. . .

3) I am paying dues to an organization whose ever-increasing attitude appears to be to want to take my "ticket" on one pretext or another."

The above opinions written by two different members of the Oregon Bar appear at first glance to be diametrically opposed. However, the two viewpoints can easily be reconciled to accomplish a true understanding of the disciplinary process. Stated simply, both of the opinions are correct, but both are missing the one essential linking element.

The first statement asserts that attorneys committing ethical violations are not being disciplined. The second asserts that attorneys are being unjustly disciplined for minor and picky items. They can be reconciled and linked as follows.

The Nonzealous attorney falls into the first category, and the Zealous attorney falls into the second category. Support the Bar and you can get away with committing ethical violations. Contest the power, authority or legitimacy of the Bar and you are placed in the second category, where every minute or petty error you make, is a point of discipline. The same issue of the Bar Bulletin contained the following submissions by Oregon State Bar attorneys on the PLF :

"Re : PLF
I object to the increase in assessments for 1983. Why should I, a lawyer one year out of law school, subsidize the lawyers who practice securities law. . . . Also, I don't want $ 200,000 of insurance - why am I forced to pay for it ? "

"The Oregon State Bar needs to adopt a policy of attempting to decrease the number of lawyers in this state. In Eugene where I practice, unnecessary legal work being done is the exception rather than the rule - not only is the economics bad but also the ethics - no

way can it improve with over 500 lawyers in Lane County, when 200 would, in my opinion, be too many."

"The Oregon State Bar has virtually no concern for the struggling young low-income attorneys, most sole practitioners. Dues structure, malpractice costs and the high referral service dues are just examples of the bar's assumption that all attorneys are wealthy. . . ."

C. BALDEREE v. OREGON STATE BAR, 301 Or. 155 (1986)

In *Balderee*, the Petitioner had been an Oregon attorney not engaged in the practice of law since 1978. He had been working for a title company and signed forms during the period 1978-1982 stating he was not engaged in the practice of law which exempted him from the PLF requirement. In December, 1982 the PLF Board of Directors attempting to further solidify its' stranglehold on the legal profession sent a letter advising that in future years attorneys requesting exemption would be required to sign an agreement to indemnify the PLF for any amounts the PLF might be required to pay resulting from a claim against the attorney for legal malpractice. This agreement was incorporated within the request for exemption form. In 1983, 1984 and 1985 Balderee signed the exemption request, but crossed out the text referring to the indemnity.

In December, 1985 the PLF informed Balderee they would not accept his request for exemption because he refused to sign the indemnity agreement. Balderee refused to sign it and also refused to pay the PLF assessment. In February, 1986 he received a "final notice" advising that failure to pay the assessment would result in suspension. He then instituted suit against the Bar in the State Supreme Court. Balderee's contention was that the enabling statute for the PLF, ORS 9.080(2) only allowed the Board of Governors to require assessments from those attorneys who were engaged in the private practice of law. The State Supreme Court disagreed with Balderee and concurred with the Bar. The Court relied on the portion of the statute that read as follows providing that the Board:

"shall be empowered . . . to do whatever is necessary and convenient to implement this provision"

The terms "necessary and convenient" were then held to include the indemnity provision. Who knows what else such a vague and ambiguous phrase could include? "Necessary and convenient" could mean whatever the Bar wants it to.

D. OSB BAR BULLETIN - January, 1986

The January, 1986 issue of the Bar Bulletin included a PLF Update section. The CEO of the PLF at that time, Les Rawls, was apparently visiting local bar associations throughout Oregon. The article indicated how poorly the PLF was viewed by many Oregon attorneys. It states as follows :

"Unfortunately, our appearances sometimes seem to be limited to responding to your questions about our activities and dispelling wild rumors which appear to have a frequent incubation in the bar."

The Update disclosed that a revision to the PLF was being made with respect to the Special Underwriting Assessment. Essentially, the change was predicated on the assertion that a few practicing lawyers were causing an inordinate drain on the funds of other "clean" lawyers. The term "clean" is actually in quotes in the article itself. It can be fairly defined as synonymous with my use of the term "Nonzealous." Pursuant to the change, it was alleged that those lawyers causing the inordinate drain

(i.e. the Zealous lawyers) would contribute more to what is termed as the "pot." My favorite part of the update hits at the core of the problem and deals with the relationship of the PLF to the Bar's Board of Governors. It states as follows in reference to the lamely alleged wall of separation between the disciplinary process and PLF:

> "When the PLF was first established, a conscious decision was made to locate the organization in separate offices from the bar in order to establish confidence among attorneys that a malpractice claim would not automatically result in initiation of disciplinary proceedings. In fact, the PLF maintains the strictest confidentiality for all malpractice claims, and does not share information with or refer matters to the bar for disciplinary proceedings."

In reference to the phrase "does not share information," try telling that to Mr. Robeson. The article continues as follows:

> "In addition, from its inception the PLF and its board of directors were generally permitted to run PLF affairs **without guidance** or interference from the bar's board of governors other than approval of the annual assessment. In this regard, the PLF was intended to operate as efficiently as if it were a private **insurance** company. Over the years, the PLF board has been blessed with the talent of . . . top executives from the **insurance** industry."

How wonderful that the PLF is generally permitted to run "without guidance." Why restrict this to the PLF? Have the entire Oregon Bar run "without guidance." Could be a Sherman Antitrust Act issue here (that's coming up in the next case). And what's this about running "as if were a private insurance company?" I thought it wasn't an insurance policy. Oh wait, that's just for purposes of evading the insurance regulations. Now read the discussion in the next case. It's an absolute beauty.

E. **HASS v. OREGON STATE BAR**, 883 F.2d 1453 (9TH Cir. 1989)

In this case, Oregon attorney Fred Hass, in February, 1987, a member in good standing of the Bar brought suit in federal court against the Bar contending that the PLF violated the Sherman Antitrust Act and the interstate commerce clause. He alleged that in mandating attorney participation in the PLF, OSB had unlawfully monopolized the market for malpractice insurance. It is important to note that he did not challenge the Bar's requirement of carrying malpractice insurance, only the requirement that such insurance be purchased directly from the PLF.

The Federal District Court Judge (himself required to be a member of the Oregon State Bar), refused to adjudicate Hass' Sherman Act claim. The District Judge ruled that the Bar's insurance requirement (note continuous use of the term "insurance," although OSB specifically disclaims that the policy is an insurance policy), was immune from challenge under the Sherman Act due to what is know as the "state action exemption." Hass appealed and the Federal Appeals Court examined the case including the state action exemption issue.

STATE ACTION EXEMPTION :

The basic thrust of state action exemption as held by the United States Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943), is that the Sherman Act which generally precludes monopolies does not apply to states acting in their "sovereign capacity." The exemption is known as "Parker immunity." The phrase "sovereign capacity" essentially means when the state acts through its legislature, or its Supreme Court performing duties in a legislative capacity. The Federal Court of Appeals in reviewing the case therefore first needed to determine whether the PLF constituted activity of a state acting in its' sovereign capacity. This would be the first step to determine if the state action exemption precluded a

Sherman Act challenge. The Court determined that the PLF was promulgated by the State Bar, rather than directly by the Oregon legislature or the Oregon Supreme Court. It indicated that since the Bar was merely an instrumentality of the state judiciary, the PLF did not constitute an act of the state in its' sovereign capacity. A correct conclusion in my belief. This portion of the holding was a win for Hass, because as stated above, the Sherman Act generally does not apply to states acting in their "sovereign capacity."

The Court then went on to examine the fact that although the PLF was not "directly" an activity of the state legislature or State Supreme Court, it was carried out pursuant to state authorization. In such an instance, the activity itself must be analyzed to ensure that any anticompetitive conduct was contemplated by the State. It is noteworthy that the Court acknowledges the activity is anticompetitive. The Court at this point appears to have established two points which are as follows :

1. The PLF is not activity of the state acting in its' sovereign capacity
2. The PLF is anticompetitive in nature.

If the anticompetitive nature of the PLF is determined to be contemplated by the State, then Parker immunity will still apply and the PLF is exempt from attack under the Sherman Act. The US Supreme Court formulated a two part test to determine whether ***Parker*** immunity applies to non-sovereign entities (the PLF) engaged in anticompetitive conduct pursuant to state authorization. The test is as follows :

1. First, it must be determined whether the conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy to be anticompetitive in nature.
2. Second, it must be determined whether the activity is "actively supervised" by the State itself.

Failure to meet both of the foregoing criteria will collapse the Bar's ***Parker*** immunity claim, and then Hass would be able to attack the PLF under the Sherman Act. The opinion analyzes each of the two prongs as follows.

(1) Above : IS THERE A CLEARLY ARTICULATED and AFFIRMATIVELY EXPRESSED STATE POLICY

To determine the articulated state policy, the Court examines the PLF legislation itself. The issue is whether the legislation contemplated the anticompetitive nature of the PLF. The Court notes that a state agency however (such as OSB) is not free to simply "do as it pleases" simply because the state has left to the agency the task of selecting the course of action best suited to accomplishing legislative policy. It relies on *Central Iowa Refuse Systems v. Des Moines Metro Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) in support of this premise. At this point you can probably see how gray and ambiguous (and confusing to say the least) the line is that the PLF is treading. The Bar's claim of ***Parker*** immunity from Sherman Antitrust liability, is hanging on a thread of hair. The Court examines the express language of the legislation itself which states the Bar is authorized to :

"own, organize and sponsor any insurance organization"

(NOTE: there's that word "insurance" again, but remember its' not an insurance policy the Bar claims.)

The legislation also states the Bar could act :

"by itself or in conjunction with other bar organizations"

The legislation also states the Bar is granted authority to:

"do whatever is necessary and convenient to implement this provision"

Hass correctly points out that the statute makes no reference to the requirement that the attorney purchase insurance from the Bar**. That mandatory requirement is the heart and soul of the anticompetitive nature. Since the legislation does not include it, I do not see how it could be deemed as intended by the legislation.** The only phrase above cited by the Court that could give rise to an expressed anticompetitive intent is the one :

"do whatever is necessary and convenient"

To the extent this phrase is relied on by the Court, logic dictates it is precluded by the Court's diametrically opposed assertion that an agency is not free to "do as it pleases." Basic rationality mandates the two phrases are mutually exclusive. If they can't "do as they please" then how can they be allowed to do, "whatever is necessary and convenient?" Facetiously speaking, perhaps the Court felt they could only "do as they please," if it was "necessary and convenient." Notwithstanding this critical point, the majority (there is a most compelling Dissent that I will discuss) incorrectly concludes that even in the absence of mentioning a mandatory requirement, the anticompetitive nature was contemplated by the legislation and the first prong is satisfied. It must now determine whether the PLF is "actively supervised" by the State itself.

(2) Above : IS THE CHALLENGED CONDUCT ACTIVELY SUPERVISED BY THE STATE

Before examining the Court's analysis of this requirement, I refresh your memory as to what PLF CEO, Les Rawls stated in the January, 1986 issue of the Bar Bulletin which was as follows:

> "In addition, from its inception the PLF and its board of directors were generally permitted to run PLF affairs **without guidance or interference** from the bar's board of governors other than approval of the annual assessment. In this regard, the PLF was intended to operate as efficiently as if it were a private insurance company."

The foregoing would seem to indicate pretty clearly that the PLF is not actively supervised by the State, and therefore Parker immunity's two part test has not been satisfied and the PLF is subject to challenge under the Sherman Act. The Ninth Circuit however, dodges the issue. The Court first correctly notes that the "active supervision" requirement of the state action exemption stems from the recognition that where a private party engages in anticompetitive activity, there is a real danger they are acting to further their own interests, rather than governmental interests of the State. The Court then however, indicates that where there is no danger the party is pursuing interests other than those of the State, there is no reason for the party to satisfy the "active supervision" requirement. Stated quite simply, the Ninth Circuit dropped the second part of the test entirely, and made it a one prong test for application to the Oregon State Bar. It then attempts to justify its' holding that there is no danger the Bar is pursuing interests other than the State by relying on the portion of the Oregon statute that reads :

> "at all times directs its power to the advancement of the science of jurisprudence and the improvement of the administration of justice." Or.Rev.Stat. 9.080(1)

It's kind of like having a statute that says something is red, makes it red, even if it's really blue. Pathetic. The Court goes on to indicate the records of the Bar are open for public inspection (although

not PLF records), and its' accounts are subject to periodic audits by the State Auditor. The Court also states that the Bar with respect to the PLF is an agent of the Legislature, rather than the Supreme Court. This is in itself quite amazing, since the Bar itself is clearly part of the Judiciary Branch. The opinion on the Sherman Act closes with the following :

> "we hold that the Bar, as an agency of the State of Oregon, need not satisfy the "active supervision" requirement to qualify for protection under the state action exemption".

A most interesting and disturbing footnote is then included which I believe illegitimizes the opinion. Footnote 4 of the opinion reads :

> "Our holding is based on the characteristics of the Oregon State Bar and the particular statutory scheme at issue in the present case. We do not hold that all state bars are protected under the state action exemption to the federal antitrust laws."

The Footnote is disturbing because the "particular statutory scheme" of the Oregon State Bar (i.e. the PLF), is less worthy of state action exemption than any other particular statutory scheme I can possibly imagine. The Court in essence applies the exemption to the worst possible fact set and then hypocritically indicates it does not necessarily apply to other State Bars. No other State Bar has done anything as egregious as the PLF. Consequently, logic dictates that if you exempt the "worst," you should at least exempt those that are better. I note this for purposes only of delineating the Court's inconsistency, not supporting a claim of state action exemption. The Court next examines Hass' challenge to the PLF under the Interstate Commerce Clause.

INTERSTATE COMMERCE CLAUSE VIOLATION BY PLF

First, a review of some basic law related to the Commerce Clause, and how it relates to the statute providing for the Bar to implement the PLF. The Commerce Clause of the US Constitution states :

"Congress shall have Power . . . To regulate Commerce . . . among the several States"

The US Supreme Court has interpreted the clause as restricting certain state regulation. *Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979). In general terms and subject to exceptions, a state statute "burdens interstate commerce" and is therefore unconstitutional when it places businesses from other states at a disadvantage with similar types of businesses located within a particular state. For instance, as an easy hypothetical, a state law requiring everyone in California to buy milk from companies based in California would burden interstate commerce and therefore be unlawful, because it would preclude companies in other states from participating in the California market. The California companies would get all the business. The crux of Hass' interstate commerce clause attack, is that since Oregon attorneys must buy their malpractice insurance from the PLF, insurance companies located in other states are essentially precluded from participating in the malpractice market within Oregon. More specifically, a state statute triggers scrutiny under the commerce clause in either of two situations which are :

1. When the state statute affirmatively discriminates either on its face or in practical effect against transactions in interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
2. When the state statute regulates evenhandedly but incidentally burdens interstate transactions. *Maine v. Taylor,* 477 U.S. 131, 138 (1986).

State actions falling into the first category are generally subject to a higher degree of scrutiny than those in the second category. This is because the first category is generally characterized by situations that more blatantly and openly burden interstate commerce. The Ninth Circuit holds that the mandatory requirement of purchasing coverage from the PLF falls into category (2) which subjects it to a lower degree of scrutiny. The Court quotes the PLF resolution which reads :

> "that such professional liability coverage (as is required by the resolution) for active members in the private practice of law, . . . shall be obtained through the . . .Professional Liability Fund"

The Court reasons that the PLF does not discriminate against out-of-state insurance companies because it burdens insurance companies in Oregon and outside of Oregon exactly the same. The concept is that all are effectively prevented from competing with the Bar to provide primary malpractice coverage. Essentially, if you treat all the companies unfairly, then you're not discriminating.

THE DISSENT – HASS v. OREGON STATE BAR

Three appellate judges rendered opinions in *Hass*. The majority consisted of Justices Goodwin and Alarcon. The Dissent was written by Justice Ferguson. It is probably one of the best Dissents that I have ever read in any court opinion. Justice Ferguson absolutely knew precisely what the PLF is all about. Specifically, his disagreement focuses on the majority's incorrect holding that the PLF need not satisfy the active supervision requirement of Parker immunity. Remember, even the majority determined the PLF was not activity of the state in its' sovereign capacity and that it was anticompetitive in nature. The decisive issue remaining was whether the anticompetitive activity had to be actively supervised.

The US Supreme Court has determined in similar situations the activity should at least be actively supervised by the State itself. While a state remains free to delegate regulatory authority to nonsovereign entities, "closer analysis is required" to ensure that such organizations receive state action immunity only when their anticompetitive actions further a demonstrated state commitment to supplant competition with regulation. *Hoover v. Ronwin,* 466 US 558, 568 (1984). The Ninth Circuit however, held that such was not necessary for the PLF.

The Dissent in *Hass* correctly points out that the "active supervision" requirement for *Parker* immunity was specifically established by the US Supreme Court to determine whether anticompetitive conduct of nonsovereigns should be shielded from federal antitrust liability. Justice Ferguson notes that the majority "glosses" over the lack of "active supervision," which fails to address the nature of the Oregon State Bar. He notes that doing so undermines the principles of federalism which are embodied in *Parker* immunity. *Hass* at 883 F.2d 1453, 1464 (9th Cir. 1989).

Ferguson beautifully delineates that at the heart of the "active supervision" requirement is a presumption that governmental bodies should regulate in the public interest. Such a presumption would not apply to private parties. When a state agency functions in a nonsovereign capacity it is essentially functioning like a private party. He notes that in such a situation, there is a real danger regulatory decisions are made to further the agency's own interests rather than the governmental interests of the State. *Hass* at 1465. The "active supervision' requirement ensures that those exercising private delegations of regulatory authority do not forsake the public goals of a state's economic policy in favor of their own private agendas. *Hass* at 1465. Absent supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. Id.

What Ferguson is saying in no uncertain terms is that without "active supervision" by the State, there is a very real danger the PLF is designed to further the economic interests of attorneys. In support of this assertion he then examines the nature of the Oregon State Bar itself. The Dissent states :

> "The majority's conclusion that the Bar need not satisfy the active supervision requirements blurs, if not eliminates, this logical distinction between public and private economic regulation. While the majority appears content to paint the Bar as a state agency or other form of public body "akin to a municipality for purposes of the state action exemption," it offers only a partially completed portrait. The Bar's private interests in the very field in which it regulates - professional malpractice insurance - coupled with the lack of public accountability for its Fund-related activities, reveals that the Bar presents a poor candidate for exemption from the active supervision requirement." *Hass*, at 1465.

In Footnote 1 of the Dissent, Ferguson notes that the majority can not even decide on what type of institution the Bar in Oregon is. He writes :

> "Apparently the majority cannot decide on the institutional pedigree of the Bar under Oregon law as it alternatively characterizes the Bar as "an instrumentality of the judicial department of the State of Oregon," "a public body. . .," "a state agency," and "an agent of the legislature for the purposes of administering <the Fund>." The majority's inability to concretely define the organizational nature of the Bar highlights its hybrid nature, and thus, serves to underscore the need for closer review of the majority's portrayal of the character of the Bar." *Hass,* at 1465.

The Dissent hits on the precise focal point of the case when it states :

> "Conspicuously absent from the majority's discussion is any acknowledgment of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. . . .
> . . .
> Perhaps in recognition of this economic reality, the Supreme Court has never authorized a state bar to exercise independent authority over regulation of the legal profession. . . . The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

The US Supreme Court in 1975 in *Goldfarb v. Virginia State Bar*, 421 US 773, 791 (1975) determined that the fact the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practice for the benefit of its members. *Goldfarb* and *Hoover* taken together reinforce the proposition that when independent regulatory authority is delegated to a state bar (such as in the case of the PLF), particular care must be taken to ensure the public authority is not being used to further private economic agendas. Haas at 1466. The Dissent is correct and the majority was wrong.

The Dissent then goes on to point out that since the majority concluded the active supervision requirement of Parker immunity did not need to be met, it did not explore whether the PLF was actively supervised. Ferguson says that only a brief review of the statutory scheme is necessary and states :

> ". . . no state actor supervises the Bar's operation of the Fund. ORS 9.080 provides no avenues for the Oregon state legislature or supreme court, . . . to "have and exercise power to review <the Bar's> particular anticompetitive acts. . . and disapprove those that fail to accord with state policy." *Hass* at 1467-1468.

The only two entities with direct authority over the PLF are the State Bar's Board of Governors and the PLF Board of Directors. Ferguson with literate beauty states that this is like the case of the **"fox-watching-the-henhouse."** *Hass* at 1468. It does not provide meaningful supervision. He

concludes this section by stating Parker's state action immunity doctrine should not protect the PLF from federal antitrust laws.

One final issue discussed in the Dissent in ***Haas*** concerns the issue of regulating insurance. As stated previously, the Oregon Bar has claimed the PLF coverage does not constitute insurance. This is to avoid having it regulated like insurance. The Dissent discusses how the Bar asserts the suit should be dismissed because the PLF falls within the McCarran-Ferguson Act's exemption to the Sherman and Clayton Antitrust Act. Under this Act, a practice is exempt from federal anti-trust laws if it is :

1. the business of insurance
2. regulated by state law
3. does not involve coercion, intimidation or boycott

It is absolutely incredible to me that the Bar would assert this exemption since the McCarran-Ferguson Act is directed primarily at the business of insurance and the Bar asserts that the PLF does not constitute insurance for purposes of regulation. The Dissent states :

> "While the Oregon Insurance Code is precisely the type of state regulatory scheme that would satisfy the Act's regulation requirement, the Fund, as note above, is expressly exempt from all requirements of the Insurance Code." ***Hass*** at 1469.

The Bar responds that the enacting legislation of the PLF, namely ORS 9.080 constitutes state regulation within the meaning of the Act. The Dissent demolishes this assertion by emphasizing that mere statutory authorization of an anticompetitive practice does not constitute regulation. In addition, during the US Senate debate on the Act, Senators McCarran and O'Mahoney repeatedly emphasized that only state legislation regulating insurance, not simply permissive state legislation would satisfy the criteria. The Oregon Bar's assertion in this area was wholly lame.

The final criteria of the exemption indicates the practice does not involve coercion, intimidation or boycott. The Bar suspends the law license of any attorney who does not pay the PLF coverage assessment. The Dissent squarely places this policy in the arena of coercion, stating :

> "The plain meaning of the term "coercion" is clearly implicated where, as here, an individual's ability to pursue her livelihood is conditioned upon her willingness to deal with one particular insurer, to the exclusion of all other potential insurers."

F. THE IMPACT OF PATRICK V. BURGET, 586 U.S. 94 (May 16, 1988)

The Ninth Circuit Court of Appeals decision in ***Hass v. Oregon State Bar***, 883 F.2d 1453 (1989) was argued on July 12, 1988 and decided on August 30, 1989. On May 16, 1988 the U.S. Supreme Court appeared to send a strong message to the Ninth Circuit that they should be declaring the PLF unconstitutional and that it was not protected by the state action doctrine. The opinion not at all coincidentally dealt with an Oregon issue (pertaining to physicians) and was right on target for the ***Hass*** issue dealing with Oregon lawyers.

Ultimately, the Ninth Circuit failed to heed what appeared to be the key mandate of the decision in ***Patrick v. Burget***, 486 U.S. 94 (1988) where the great Justice Thurgood Marshall wrote the lead opinion for the Court. In ***Patrick***, the Court Reversed the Ninth Circuit on the issue of the state action doctrine with respect to the "active supervision" prong of ***Parker*** immunity. The U.S. Supreme Court held as follows:

"Held : The state action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer review committees. The "active supervision" prong of the test used to determine whether private parties may claim state action immunity requires that state officials have and exercise power to review such parties' particular anticompetitive acts and disapprove those that fail to accord with state policy. This requirement is not satisfied here, since there has been no showing that the State . . . or the state judiciary reviews -- or even could review -- . . . to correct abuses."

Haas, itself was never heard by the U.S. Supreme Court which denied certiorari in 1990.

G. ERWIN v. OREGON STATE BAR AND ITS BOARD OF GOVERNORS

Trial Court Case #95-04-241 Court of Appeals Case # A92236 (1997)

In *Erwin* the Plaintiff, Oregon attorney Warde H. Erwin, a member of the Oregon State Bar since 1939 (yes, you read that correctly since 1939) filed a Motion for Declaratory Judgment against the Bar's PLF. This man had been a member of the Oregon Bar continuously for a period of 58 years. He had seen pretty much all the changes that occurred within the Bar and he didn't like the PLF. That alone in my view, tells you a lot. Mathematics indicate that he had to be in his 70s or 80s when he instituted this litigation. A period of time in one's life when you wouldn't think a person would be much interested in changing the system. He obviously however, felt strong enough about the diabolical nature of the PLF to do so. When a man in his 70s or 80s speaks, people should listen.

Erwin directly challenged the provision that required suspension of one's law license for failure to pay the PLF assessment. He directly attacked the fact that the Board of Governors had not established a professional liability insurance agency as the enacting legislation allowed, but had instead established the PLF which it characterized as a "claims-made indemnity fund." Specifically, Erwin alleged the PLF held in reserve assets totaling many millions of dollars contrary to the provisions of the enacting legislation. He alleged that the assessments collected were used for numerous activities unauthorized by the enacting legislation.

The Board of Governors moved to dismiss the claims and the trial court judge in Clackamas County, Judge Raymond R. Bagley granted the motion and further striked the third and fifth count (which are not delineated in the appellate opinion so I don't know what they were) as sham and frivolous. Erwin appealed.

The appellate opinion rendered by Justices Riggs, Leeson and Landau addressed primarily procedural issues concerning dismissal and the definition of sham and frivolous allegations, as they pertain to a Motion for Declaratory Judgment. The State appellate court affirmed dismissal of all counts of Erwin's complaint except for the third, fourth and sixth stating :

"We first note that, upon careful review of the complaint, the dismissal of all counts but three--the third, fourth and sixth--must be affirmed. In each case, plaintiff failed to allege more than an abstract interest in the validity of the challenged laws, and we therefore affirm the dismissal of those counts without further discussion."

In Count 3, Erwin alleged that the automatic suspension provision for nonpayment of PLF assessments was unconstitutional because it deprived a nonpaying member of due process of law. The Court of Appeals determined the count as a matter of procedure was sufficiently well pleaded to survive dismissal. The matter was then remanded back to the trial court for further proceedings to determine

the legitimacy of substantive issues in the claim. In Count 4, Erwin alleged that the suspension provision constituted a taking of property without just compensation in violation of the Oregon and United States Constitutions. Similar to the above, the Court of Appeals reversed the trial court's dismissal and remanded back for further proceedings. In Count 6, Erwin alleged the PLF monies were being used for activities not authorized by the enacting legislation. As above, the Court of Appeals reversed the trial court's dismissal and remanded back for further proceedings. The appellate opinion was primarily directed at the procedural sufficiency of the complaint, rather than addressing the substantive issues. Nevertheless, it must be construed as a win for an elderly attorney fighting against the self-serving economic interests of the PLF and Oregon Bar Board of Governors. Albeit a small win. I have not come across anything regarding further proceedings in this case.

H. THE WESTVIEW INVESTORS SCANDAL

On November 14, 1999, the victimization of two Nonattorney citizens (Pearce and Woodfield) by the Oregon State Bar PLF was publicized on a wide-scale basis by Oregon's main newspaper, The Oregonian. Jeff Manning wrote an article titled, "Malpractice fund scheme backfires." The article described the following story and sequence of events. In July, 1995 according to The Oregonian, a group of 90 attorneys was brought together to discuss how best to dodge the heat of attorney malpractice lawsuits. Later during the weekend, the PLF's executive director, Kirk Hall, had dinner with Oregon attorney John Davenport. Their prey would be Pearce and Woodfield who were already in the process of suing their former attorney for malpractice. Pearce and Woodfield had previously declared bankruptcy, but it was overturned by the Ninth Circuit Court of Appeals. The appellate opinion contained a stinging criticism of their former attorney. The result was that Pearce and Woodfield were left liable for the debts they were seeking to discharge through the bankruptcy.

The PLF's goal was to acquire one of the unpaid debts, so that any amounts Pearce and Woodfield recovered from their malpractice claim, would then have to be paid right back to the PLF in satisfaction of the acquired debt. The PLF had already hired two other attorneys to defend against the malpractice claim. Davenport's job was to set up a shell company, which he ultimately called Westview Investors Inc.. Westview purchased with $ 85,000 of PLF funds, one of the large outstanding judgments against Pearce and Woodfield. Davenport then pursued collection of the debt by attempting to have the Multnomah County Sheriff seize the legal rights to any proceeds from the malpractice claim.

The fact that Davenport and Westview were actually functioning on behalf of the PLF, which was simultaneously purporting to attempt to settle the malpractice claim, was never disclosed. Davenport's firm even went so far as to threaten to seek arrest warrants against Pearce and Woodfield. In July, 1996, Mike Greene, one of the attorneys representing Pearce and Woodfield decided it was time to learn more about the mysterious Westview Investors, Inc.. They requested a bankruptcy court 2004 exam, which gives the attorney of a bankrupt debtor the opportunity to interview creditors under oath. They interviewed PLF attorney Davenport. The following transpired :

"Greene : Are you telling me you don't know if you have ever been an officer ?

Davenport : There was a suggestion at one time, which I haven't confirmed, that I may have been listed originally as an officer.

Greene : Do you remember which officer ?

Davenport : No.

Greene : Have you ever been a shareholder of Westview Investors Inc. ?

Davenport : Without looking at the records, I don't know that I can answer that question.

Greene : Are you saying to me you don't know, as we sit here, whether you have been a director ?

Davenport : . . . Yes, I would say that I do not have a current recollection of that.

Greene : Where is the office of Westview Investors ?

Davenport : The principal place of business ?

Greene : OK.

Davenport : I don't know. I don't know what office means."

PLF executives grew alarmed when they learned of Davenport's evasions. They hired Portland attorney Susan Eggum to work with him to prepare a list of corrections to the testimony. Along with the corrections was a copy of the $ 85,000 transfer from the PLF to Westview. Once its' role was discovered, the PLF scrambled to settle the case and eventually agreed to pay more than $ 1.5 million. Mike Greene, outraged at the PLF's tactics began to prepare an ethics complaint against virtually everyone involved in the case. Davenport was suspended from practice for six months, but it was determined that the PLF was in the clear.

Oregon State Bar investigator David Berger stated "It was offensive, but it wasn't illegal." Two days after the first newspaper article on this case, on November 16, 1999 Oregonian columnist Steve Duin published an article titled, "Ethical, legal and just plain reprehensible." Duin's article read in part as follows :

> "Call it the ultimate lowering of the Oregon State Bar.
>
> And roll out all the old lawyer jokes. We need some comic relief after discovering just how low the Bar will go.
>
> . . .
>
> It is also dirty pool. "Damnedest thing I've ever seen," said Circuit Court Judge Harl Haas, who presided over the malpractice case. "This conduct by the Fund makes private insurance companies look like Mother Teresa.
>
> "When the Legislature passed the liability fund legislation, the Bar went down and testified this was consumer-protection legislation, that we were going to see to it that the victims of malpractice had a remedy against their lawyer."
>
> Instead, the judge argued, the PLF strategy was an attempt to "unfairly and wrongly defeat the plaintiff's claim." What's more, Haas said, "The very concept of asset acquisition continues to enable the public to look at lawyers and think of sharks."
>
> . . .
>
> . . . In his 39-page response to a Bar investigator's findings, Hall argued, "While the strategy used in the Pearce case is subject to a policy debate, it was ethical and legal."

Only recently has he turned contrite. Now calling the asset acquisition approach "clearly questionable," . . . .

. . .

Karen Garst, the Bar's executive director, said Monday that the asset-acquisition gambit won't happen again. "While it is perfectly legal for an insurance company to do this, that is not the type of insurance company we want to run," Garst said.

But in a revealing addendum, Garst noted the strategy was employed only because the plaintiffs refused to settle."

The very next day, November 17, 1999, The Oregonian published a third article addressing the State Bar's refusal to demonstrate remorse and rehabilitate itself, that read in part as follows :

"Oregon is the punchline of a joke that the State Bar, the association of lawyers, played on the Legislature and Oregon citizens.

The bar convinced the Legislature in 1977 to create a Professional Liability Fund, a pot of money the bar promised to oversee and use to ensure that the victims of malpractice had a remedy against their lawyers.

Now, the bar has admitted that the managers of the malpractice insurance fund tried to rip off the very people the fund was supposed to protect from unethical, unprofessional behavior by lawyers.

Further, the bar's leaders are unwilling to state clearly and forcefully that this scheme was wrong, it was sleazy, and should never be repeated. Instead, Kirk Hall, the bar liability fund's chief executive, says only, "I probably would not do it again."

. . .

This scheme ought to prompt major changes in the oversight of the fund. If the bar continues to insist that its scheme was legal and ethical, then the Legislature should either take the administration of the fund away from the Bar and give it to the state treasurer or attorney general's office, or create some permanent independent oversight board more accountable to citizens."

On November 28, 1999 the Oregon State Bar published a letter of apology on its' Internet web site, which read in part as follows :

"Oregonian reporter Jeff Manning did an excellent job of reporting this very complex case last Sunday. Columnist Steve Duin followed up on Tuesday with a column that was intensely critical of the bar and the fund, as was the lead editorial on Wednesday's editorial page.

The Oregonian got it right. While the "judgment acquisition" strategy does not violate any laws or legal ethics rules, it is still just plain wrong. It was wrong to use it . . . .

. . . We have two apologies to make : one to the public, and one to our members.

. . .

The state bar has violated your trust. We are sorry.

. . .
This has been an ugly episode in the history of our organization. . . ."

On April 15, 2000, The Oregonian published that Kirk Hall, Chief Executive officer of the PLF who had spearheaded the idea behind Westview Investors Inc., had submitted his resignation to the PLF. He said that he was quitting for personal reasons and was ready to move into the private sector stating :

"It's something I'm very happy about and very excited about."

I. THE OSB PLF TASK FORCE REPORT

On June 28, 2000, the Oregon State Bar published the results of its' PLF Task Force Report. Approximately seven months had passed since The Oregonian succeeded in obtaining their uncoerced confession that the Bar had violated the public's trust. The Report was designed essentially to save the PLF. The Bar simply dug a deeper political hole for themselves, as the Report contained substantial false and misleading information.

For ease of reading, I have identified the passage of the Task Force Report at issue, and then described the manner in which it is False or Misleading by numbering such as "COUNTS." Although the Task Force Report contains numerous inaccuracies beyond the below listed five "Counts," the following is sufficient to demonstrate that the PLF still is intent on engaging in false, misleading, and deceptive conduct, and is amenable to further violation of the general public's interest.

COUNT 1 :
The Task Force Report published in June, 2000 states as follows :

"2. The PLF **mission statement** provides :

The mission of the PLF is to **manage for the Oregon State Bar** a legal malpractice liability program at the least possible assessment consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention."

In reference to the foregoing, the Report failed to disclose that as recently as 1997, its' Claims Made Plan incorporated a **public interest element**, which was apparently eliminated thereafter. Section 6 of the 1997 Plan stated:

> "The object of this program was to provide mandatory coverage at minimum cost to attorneys **while assuring the public** that each attorney in private practice would have certain minimum levels of protection."

The discrepancy is further exacerbated by the fact that in Section III of the Task Force Report, the PLF Mission Statement was delineated as follows:

"This brief mission statement **does not specifically address the notions of a duty to the public** on behalf of the PLF. The PLF Long-Range Planning Committee has proposed that the mission statement be enhanced . . . ."

The Task Force Report then goes on to propose adoption of a public interest component. The inescapable conclusion that basic predicates of logic mandates is as follows. As recently as 1997, the

stated "mission" included a public interest component. That element was subsequently eliminated, in all likelihood without knowledge of the Oregon legislature.

Regarding the "public interest" discrepancy, the Report vacillates between falsely conveying the impression that such an element never even existed and occasionally mentioning a public interest component. The Report then proposes adoption of such an element. By failing to candidly acknowledge the existence of the original public interest component of their mission statement, and then attempting to appear benevolent by suggesting that the Bar is now taking the initiative to incorporate a public interest element, the Task Force engaged in false, misleading, and deceptive conduct designed to violate the public's trust even further.

COUNT 2 :

The Task Force Report published in June, 2000 states as follows :

> "The overall finding of the Task Force is that PLF policies, practices and procedures are legal, **ethical and professional** in every respect."

Yet, in November, 1999 the President and President-elect of the Oregon State Bar issued a public apology regarding the PLF that stated as follows :

> "The state bar has **violated your trust**. We are sorry."

This author submits that if the PLF violated the public's trust, there is absolutely no way possible for its policies, practices and procedures to be ethical and professional in every respect. The operative phrase is "in every respect." The foregoing Task Force Report passage is unreconcilable with the State Bar's letter of November, 1999. As such, the assertion that its' policies, practices and procedures "are legal, ethical and professional in every respect" must be held as false, misleading and deceptive.

It is noteworthy that the November, 1999 letter was written in response to intense public scrutiny that the PLF was under from the Oregonian newspaper. It appears that the goal of the PLF was to neutralize the political impact of The Oregonian's reporting by issuing an apology, and then once the public clamor evaporated, the PLF intended to go right back to conducting itself in the same immoral manner to which it had become accustomed.

COUNT 3 :

The Task Force Report issued in June, 2000 states as follows :

> "The overall finding of the Task Force is that PLF policies, practices and procedures **are legal,** ethical and professional in every respect."

The State Bar's letter of apology issued in November, 1999 stated as follows :

> "While the "judgment acquisition" strategy **does not violate any laws** or legal ethics rules, it is still just plain wrong."

The Task Force Report however, then later states:

"Conclusion : Whether the judgment acquisition strategy is legal in Oregon **is uncertain**. . . ."

Since the legality of the acquisition strategy was uncertain, the Task Force's contradicting statement that it was legal, as well as the statement of legality in the November, 1999 letter of apology must logically be construed as false, misleading, deceptive and a further violation of the general public's trust.

COUNT 4 :
The Task Force Report published in June, 2000 states as follows :

> "The Task Force found no evidence of a pattern of unwritten claims practices or strategies that raised legal, ethical or professional concerns."

Since it appears that the "judgment acquisition" strategy was not incorporated into any written policies or procedures of the PLF, and was used at least 5 times according to the PLF Task Force Report, which thereby constitutes a pattern, and further as it was apparently discussed at length on numerous occasions by PLF officials, and further as it's method of implementation resulted in the State Bar violating the public's trust as confirmed by the November, 1999 letter of apology, the foregoing conclusion in Paragraph (7) must logically be held to be a further example of false, misleading and deceptive conduct designed to violate the public's trust.

COUNT 5:
The Task Force Report published in June, 2000 states as follows :

> "The PLF is operating **legally**, ethically and according to its mission and policies to the benefit of the public and Oregon lawyers."

Since the state bar confessed to violating the public's trust in its' letter of November, 1999 the foregoing conclusion is unsupportable by the facts, law and evidence. Additionally, since the Task Force confessed that the legality of the "judgment acquisition" strategy was "uncertain" in Oregon, the foregoing conclusion is false, misleading, deceptive and a further attempt to violate the public's trust.

COUNT 6 :
The Task Force Report published in June, 2000 states as follows :

> "However, because of our strong duty to our insured, we have never believed it was appropriate for us to warn a claimant or claimant's attorney of a specific, approaching statute of limitation. We believe our insured would tell us we were breaching our duty to them if we did so."

The Task Force is correct on this issue. The problem however, is that the Oregon State Bar and State Supreme Court adopted a diametrically opposed position in the Porter and Bodyfelt case described on page 682, herein. In that case, the Oregon State Bar and Court determined that local "courtesy" required an Oregon attorney to provide notice before obtaining a default judgment, even though no rule or statute required such. The disparity between the stance adopted in the Task Force Report, and by the State Bar Disciplinary Committee when dealing with Zealous attorneys who do not work for the PLF,

has the impact of increasing the probability that a PLF Defense would be successful, since PLF attorneys are exempted from so-called "courtesies" and "local custom" required of other Oregon attorneys. The Task Force failed to disclose this disparity, and as such its' assertion of a "strong duty" is misleading. Essentially, the Task Force seeks for Oregon attorneys to only be Zealous, if they are working for the PLF.

PLF Task Force Concluding Analysis :

Based on the information included in the PLF Task Force Report, it must be concluded that the State Bar's 1999 letter of apology was written solely for the purpose of quelling public clamor about the PLF which occurred as a result of the investigation skills of The Oregonian. Once the PLF felt it could escape the immediacy of the situation, it formulated a Task Force and issued a Report that was solely designed to justify its' program for its' own self-interests. In doing so, the Report included numerous inaccuracies, false statements, misleading statements, and was a further example of the deceptive nature and mindset of Oregon State Bar officials.

Once the State Bar issued its' November, 1999 letter openly confessing in no uncertain terms to having violated the public's trust; the legitimacy of the PLF was wholly and conclusively gone. No governmental system or institution can be viewed as credible by the general public in light of such. The Task Force was cognizant of that fact, and consequently tried to withdraw from the expressed certainty of the Bar's earlier overt and express confession of guilt.

V. CONCLUSION

A. THE PLF and ATTORNEY FEES AND COSTS

Several years ago, I came across at the University of Oregon law school library a book for Oregon attorneys published by the Oregon State Bar on family law. Included within was an article titled "Attorney Fees And Costs" written by Paul Saucy, an Oregon attorney of the now defunct law firm of Saucy and Lipetzky. Paul Saucy coincidentally represented my ex-wife in our child custody dispute which I lost. I do not address that case however within this discussion of the PLF.

I only seek herein to address the article Mr. Saucy wrote since its' perspective was adopted by the Oregon State Bar. The article standing alone, indicates the detrimental effect on the quality of justice rendered to the general public by the Bar Friendly attorney, which is created by the existence of the PLF. Saucy discusses various aspects of imposing legal fees on the client such as how to quote fees, obtain a retainer and the need for written fee agreements. He writes the article from the perspective of serving the attorney's interest. The problem arises when he stresses (on behalf of the Oregon Bar) that the attorney's interest must be served even if doing so is at the sacrifice of the client. Specifically, he states :

> "Remember how much more important it is to feed and cloth your family than it is to help a client with her particular problem"

This statement included in the Oregon State Bar's family law publication captures fully the lack of regard held by the Oregon Bar for the litigants. The callousness with which Saucy's opinion is phrased, lends to an impossibility of rationally justifying the Bar's rubber stamp of approval. Saucy is certainly free pursuant to the First Amendment to publish and express his opinions, however stupid they are. The Bar however, if indeed it is designed to further the interests of the general public, should never have given their stamp of approval to a premise that elevates the attorney's interest above that of the common citizen. It suggests undeniably that the fees, earning, security and safety of the attorney and his family come before the interests of the helpless general public who are at their mercy and whim. To promote such financial security and safety, their exists the PLF for the benefit of the Bar-friendly attorneys.

B. THE PORTER and BODYFELT CASE

In Re Complaint as to Conduct of . . . Porter, 320 Or. 692 (1995)

Any case involving an attorney named Bodyfelt, has to be a great one. I love the name. The attorney being disciplined however, is Porter, upon the filing of a complaint by Attorney, Bodyfelt. Typically, members of the public properly believe that lawyers are not disciplined frequently enough. This is due to the fact that after Nonattorneys become the victim of unethical lawyer conduct, they find the State Bar simply ignores their ethical complaint. There is however a corollary to the rule, almost unknown to the public.

The corollary is that certain groundless ethical complaints, typically filed not by aggrieved litigants, but rather instead Nonzealous attorneys, are given too close and strict consideration by the State Bar. Instead of applying ethical predicates in accordance with the law and enacted rules, the Bar searches and strives to find a justification for disciplining what it perceives to be a Zealous attorney. There is little need in my belief to cite cases of disciplinary complaints that should have received attention by the State Bar filed by Nonattorneys which are whitewashed. Pretty much everyone knows by now that is common place. Rather instead, I wanted to provide a good example of an attorney who was unjustifiably subjected to discipline for violating the local "customs" of "Bar Friendliness."

Attorney Porter, on behalf of his Nonattorney clients (apparently a husband and wife), instituted suit against a large company regarding a defective mobile home. Porter properly informed his clients that if the Defendants did not respond to their Complaint, his clients could obtain in Federal Court what is known as a Default Judgment. Essentially, it means that if the opposing party doesn't file an opposition to the claim, the Plaintiff just wins automatically.

In Oregon, at the time (and currently I believe) there was a difference in State law and Federal law about defaults. If the claim was filed in State Court, before applying for a default, the Plaintiff was required to provide the Defendants with a Notice of Intent to Apply for Default. Federal rules however had no such requirement. You could just go and obtain the default, so long as you had properly served the Defendants with the Complaint.

The Nonattorney Plaintiff clients, obviously loved the idea that if they filed their suit in federal court, a default could be obtained without additional notice, if the Defendants didn't answer. The Plaintiffs repeatedly called Porter on the phone to find out whether the time for the Defendants to file an answer had expired. I would have done the exact same thing.

The time expired. They instructed Porter to obtain the default judgment. Porter properly complied. He was fully in compliance with the Federal Rules of Civil Procedure in doing so, and did exactly what zealous representation on behalf of his client demanded. Incredibly, he was then disciplined by the Oregon Bar for doing so.

The Oregon Supreme Court's opinion on the discipline of Porter is nothing short of irrational. He was disciplined notwithstanding his compliance with the written Federal rules and law. Specifically, the Bar and Court determined that although he was in compliance with the written Federal rules and law, he violated norms of "local custom and courtesy" between Oregon attorneys. Local custom (be a nice guy to the opposition, even at the expense of your client) purportedly required Porter to not obtain a default judgment, without giving the opposition notice, even though the written rules contained no such requirement. The disciplinary opinion states :

> "The accused argues as an overarching matter that, if a lawyer complies with all of the procedural courtesies required by the Federal Rules of Civil Procedure (FRCP), the lawyer cannot be guilty of an ethical violation. . . . That argument is unpersuasive. . . .
>
> . . .
>
> Oregon's ethical rules and standards of professional conduct began as **customs of courtesy** and practice. There was nothing else. . . .
>
> "A member of the state bar **shall not ignore known customs** or practices of the bar of a particular court, **even when the law permits**, ...
>
> . . .
>
> Accordingly, we hold that it is no defense to a charged violation of DR 7-106(C)(5) that the offender's acts were in compliance with another rule. . . .
>
> . . .
>
> "A **custom has the force of law**, and furnishes a standard for the measurement of many of the rights and acts of men. . . . "
>
> . . .
>
> DR 7-106(C)(5) provides for the **discipline of lawyers who "fail to comply with known customs of courtesy . . . .**"

The Disciplinary rule relied on, by the Court DR 7-106(C)(5) in force at the time, and cited in Footnote 2 of the opinion read as follows:

> "In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not: . . .
> (5) Fail to comply with known **local customs of courtesy**. . . ."

That rule in my belief is nothing short of crap. The lawyer's duty is to comply with objective, unambiguous court rules and objective standards of practice. Clients hire lawyers to fight their battles for them. They are not hired to be friends with opposing counsel, or waive procedural points of leverage at the expense of their clients. I close discussion of this case by noting three additional points that cut into the purported legitimacy of the Oregon Supreme Court's irrational opinion, and the Bar's so-called Statement of "Alleged" Professionalism, which fosters the precise animosity the public has towards the manner in which Nonzealous attorneys sell them out regularly. Those points are as follows:

1. Why is there no comparable "custom of courtesy" required for Oregon attorneys litigating against Pro Se litigants ?
2. Doesn't disciplining the attorney in this case, result in Oregon State Law being elevated above Federal law ?
3. Is procedure in Federal courts to be dictated by State "local custom and courtesy.?"

C. THE PLF, THE UNAUTHORIZED PRACTICE OF LAW and PROCEDURAL BIAS REVISITED

On July 8, 1998 I visited the Oregon State Bar's web site on the Internet. The web site at that time had a small section on the PLF which provided a summary of the Plan, but notably did not include the statutes, regulations or specific rules of the Plan. This was surprising because the same web site did include virtually all other rules and regulations pertaining to the State Bar. It was clear they wanted to hide the detail and specifics of the PLF.

In the mid 1990s, while thumbing through some old Oregon Bar Bulletins at the Lewis and Clark Law School Library, I came across an article titled "Have License, Will Travel" from the October 1993 issue, written by Sylvia Stevens in the "Bar Counsel" section. It addressed the status in Oregon with what is known as the unauthorized practice of law. Most people are aware that to practice law you need a law license issued by a state, which requires a law school education and admission to a state bar which is normally the licensing agency. If you perform legal services without a license, depending on the state you may be in violation of a statute and/or subject to an injunction from a court prohibiting you from continuing to do so in the future. Throughout the years and in all states, there has been a great deal of litigation regarding the unauthorized practice of law and what actually constitutes the "practice of law" so as to fall within its' prohibitions.

Typically, those seeking to liberalize rules and statutes pertaining to the unauthorized practice of law stress the current state of dissatisfaction with attorneys nationwide, the unavailability of legal services, and the anticompetitive nature of such rules and statutes. Those supporting stringent rules and statutes that prohibit the unauthorized practice of law stress the need to protect the public from having services provided by incompetent individuals and having the practice of law regulated to protect the public. I do not address herein the merits of either position, since the issue is sufficiently complex that a separate article would be necessary on the subject. I raise the issue only to point out a specific peculiarity that I came across pertaining to this issue in Oregon. Typically, an attorney licensed in one state can not provide legal services in another state. The article "Have License, Will Travel" in

addressing the issue of Oregon attorneys performing legal services for those in other states, states as follows:

> "On the other hand, it seems clear that a lawyer licensed in Oregon, and whose only office is in Oregon, is free to advise a client about another states' law, even where the client is a resident of the other state and the matter involves factors physically related to the other state, such as land. Similarly, there is no logical reason why a state should refuse to give effect to legal documents (such as deeds) prepared by an out-of-state lawyer, so long as the work was permissible in the lawyer's own state and is otherwise in compliance with the other state's requirements."

The thrust of this statement is that Oregon lawyers can provide legal services for clients located in other states. The article then hypocritically flip flops and with typical Oregon State Bar arrogance states in reference to Non-Oregon attorneys :

> "The other facet of this issue concerns the nature and extent of practice that can be conducted in Oregon by attorneys licensed in other states. . . .
>
> ORS 9.160 states that "No person shall practice law or represent himself as qualified to practice law unless he is an active member of the Oregon State Bar."

The hypocritical arrogance of these positions is incredible to me. Oregon attorneys under Oregon law can provide legal services to people in other states, but attorneys from other states can not provide legal services to people in Oregon. It has the exact same precise stench of the PLF's requirement that malpractice insurance (excuse me, I mean "coverage" because it's not considered "insurance") must be purchased from the Oregon State Bar, thereby essentially excluding all other insurance companies from selling malpractice insurance to Oregon attorneys.

The PLF is nothing short of an ethical atrocity or comedy depending on how you look at it. The constitutional infirmity and hypocrisy that permeates it is both ethically atrocious and yet, so obvious in nature as to be comical. It almost eliminates the possibility of a fair adjudication or zealous representation particularly in the area of legal procedure. Procedural rulings become dependent on what is in the best interests of the Bar and who has the Bar Friendly attorney.

In 1994, Judge Paul J. Lipscomb of the Marion County Circuit Court was assigned to the child custody dispute between my ex-wife and I. I was a third year law student acting Pro Se. She was married to William Francis, an Oregon attorney and represented by Paul Saucy, also an Oregon attorney. Saucy filed a Motion to Modify that was procedurally defective. I was a Pro Se who knew the law. I filed a Motion to Dismiss respectfully citing each deficiency. In his chambers, when denying my motion, the official transcript indicates Judge Lipscomb made the following statement to me :

> "Let me give you a little background on me. I am a real poor one to argue procedural form over substance type of issues. . . . I have sometimes trouble being patient with skirmishes over paperwork. . . . I just don't have patience for that." (Official Certified Court Transcript)
>
> "What I'm telling you is that I am not going to spend a lot of time worrying about whether the Ts are crossed and the Is are dotted. I'm going to get to the end of the line as quickly as we can. . . . That is the way I do business." (Official Certified Court Transcript)
>
> "You prefer it done on paper. That is not real life." (Official Certified Court Transcript)

After I irritated his hyper-sensitive judicial ego a bit more, by respectfully insisting the rules of procedure be followed, and after I lost custody of my son, I began researching Lipscomb's appellate record and the briefs filed. In *125 Or. App. 385* (1993) the Defendant was a Pro Se Nonattorney who was not at all versed in the law. When dealing with this individual Judge Lipscomb adopted a substantially different tact. The official transcript cited in the appellant's brief filed by the Public Defender includes the following exchange :

DEFENDANT : Sir, I'm not guilty, your honor, that's all I've got to say.

THE COURT (Lipscomb) : That doesn't matter. I'm only concerned about the procedures. . . . I just have to make sure that the procedures go along.

Two different litigants. Both acting Pro Se. One well versed in the law, the other not. Same Judge. Two entirely different approaches to procedural law, by that same Judge. The purpose of this paper has been to demonstrate that the PLF creates that disparity.

D. THE PLF CAUSES JUDICIAL RULINGS TO BE BASED ON FINANCIAL INTERESTS OF THE OREGON STATE BAR

The provision of malpractice coverage by the State Bar conflicts with the disciplinary function and therefore creates unconstitutional economic incentives to predicate Judicial Rulings on financial interests of the State Bar, rather than the law, facts and evidence. Litigants are consequently deprived of fair and impartial adjudications in violation of their Fourteenth Amendment rights. A litigant's right to an impartial adjudication is also unconstitutionally infringed because the PLF diminishes the likelihood of finding an Oregon attorney who will zealously argue all points of their case. Any Oregon attorney who zealously represents a client potentially jeopardizes State Bar financial interests, thereby placing their own professional status before the Bar at risk.

The PLF unconstitutionally infringes on a litigant's ability to obtain an impartial adjudication by placing an inordinate burden on the Oregon attorney. This occurs because the PLF creates a legal environment that penalizes Oregon attorneys for providing zealous representation. The provision of zealous representation increases the likelihood opposing counsel will be sued for malpractice. The few zealous Oregon attorneys that exist are placed in a situation where by providing zealous representation they jeopardize State Bar financial interests. That same State Bar has disciplinary power over them. The State Bar has the perfect means at its disposal to get even with such an attorney, which is to subject them to unwarranted discipline. Similarly, the PLF creates economic incentives to unjustly reward attorneys who protect State Bar financial interests by treating them inordinately lenient in the context of discipline. The result is discipline for ethical, zealous representation, and an absence of discipline for unethical conduct.

The burden placed on Oregon attorneys unconstitutionally infringes the litigant's right to an impartial adjudication by creating economic incentives for judicial rulings to be predicated on whether a litigant's counsel protects State Bar financial interests by failing to provide zealous representation, or whether such counsel is a potential financial cost to the Bar by providing zealous representation. If the Court is faced with two Oregon attorneys on opposing sides of a case, both of whom protect the State Bar financial interests, a unique situation occurs. There exists potential for the issue to actually be decided on the merits.

The PLF unconstitutionally infringes on a Pro Se litigant's ability to receive an impartial adjudication most acutely, by creating an irrational bias within the Judiciary against Pro Se litigants. Pro Se litigants therefore have an unconstitutionally diminished likelihood of receiving fair rulings on their

Motions by maintaining the right of self-representation. Competent Pro Se litigants who are typically more skilled in procedural matters than members of the Oregon State Bar, represent an economic threat because they will file motions delineating procedural defects in pleadings of opposing counsel without hesitation. Such motions if granted will result in opposing counsel being potentially liable for malpractice. Only in Oregon, does this result in the State Bar's financial interests being jeopardized, since malpractice coverage is provided by the PLF. This creates acute economic incentives to deny meritworthy motions filed by Pro Se litigants by falsely characterizing them as meritless.

The requirement that malpractice coverage be purchased directly from the "fox" (PLF), implemented under threat of suspending the attorney's law license is unethical and unconstitutional. The conflict of interest has caused the disciplinary process to become infected by State Bar monetary interests. The following is an easy reference summary of how litigants in both the civil and criminal context are deprived of impartial adjudications due to economic incentives created by the PLF :

1. Oregon attorneys have an economic incentive to ignore valid objections to procedural defects in the pleadings of opposing counsel, since if they successfully contest defective pleadings, opposing counsel may be sued for malpractice which would cost their State Bar money.

2. Trial court judges have an economic incentive to deny motions to set aside incompetently drafted Judgments VOID on their face, since if they grant such motions, either party may sue the attorney that represented them for malpractice which would cost the State Bar money.

3. Trial court judges have an economic incentive to deny motions directed at procedural defects in pleadings, since if they grant such motions, counsel that submitted the defective pleading may be sued for malpractice which would cost the State Bar money.

4. Competent Pro Se litigants who are typically more skilled with respect to procedural matters than members of the Oregon State Bar, represent an economic threat to the Bar, because they will file motions delineating all procedural defects in pleadings, which if granted will result in opposing counsel being potentially liable for malpractice. As a result, Pro Se litigants are unjustly branded by Oregon attorneys as economic enemies of the Bar. Acute economic incentives therefore exist to deny meritworthy motions filed by Pro Se litigants by falsely characterizing them as meritless.

5. Since breaches of ethical conduct are not covered by the PLF, the State Bar has the opportunity to unjustly evade liability for malpractice by imposing discipline on the attorney.

6. Trial court judges have an economic incentive in support of State Bar financial interests to render rulings resulting in the exclusion of evidence when an aggrieved litigant sues an attorney for malpractice.

7. The PLF's lack of active supervision allows the financial incentives incorporated in 1-6 above, to dominate the legal profession within Oregon.

8. Oregon attorneys know that if they represent aggrieved litigants who are the victim of attorney malpractice, they will cost the Oregon State Bar money. Since the State Bar possesses disciplinary power, a financial incentive is created for the Bar to discipline Oregon attorneys that regularly represent litigants instituting malpractice suits against other Oregon attorneys. The result is that attorney malpractice runs substantially unchecked in Oregon.

9. DR 7-101 which is titled, "Representing a Client Zealously" states as follows :

"(A) A lawyer shall not intentionally :

(1) Fail to seek the lawful objectives of the lawyer's clients through reasonably available means permitted by law . . . .

. . .

2. In the lawyer's representation of a client, a lawyer may :

(1) Where permissible, exercise the lawyer's professional judgment to waive or fail to assert a right or position of the lawyer's client."

Subsection (B)(1) dilutes the responsibility of (A)(1). The factors determining when failure to assert a client right or position, is allowed are when "permissible" and within "professional judgment." The PLF creates economic incentives to expand the scope of "permissible," beyond reason. It also infects "professional judgment" with economic incentives resulting in irrational waivers of valid objections, commonly referred to by litigants as "betrayals."

10. Trial court judges have economic incentives in support of State Bar financial interests to falsely represent Judgments have been signed and entered, or fail to serve signed Orders upon litigants as required by ORCP 9, for the purpose of frustrating the litigant's Right of Appeal when they know a successful appeal may place Oregon State Bar financial interests at risk.

11. Trial court judges have economic incentives in support of State Bar financial interests to intentionally frustrate a litigant's Right of Appeal by any means at their disposal when they know a successful appeal may place Oregon State Bar financial interests at risk.

The result of the PLF is that every single "Oregon litigant" is treated in a manner disadvantageously compared to litigants in every single other state. Oregon litigants represented by counsel are treated in a disadvantageous manner compared to litigants in other states because the PLF creates improper economic incentives for such counsel to fail to raise valid objections on behalf of their clients, when an opposing party is represented by counsel, in order to protect each other from malpractice lawsuits. The concept is essentially a premise that "if you don't point out my errors, then I won't point out yours and neither of us will be sued for malpractice."

Oregon litigants who represent themselves Pro Se are treated in a disadvantageous manner compared to Pro Se litigants in other states, because they represent a greater economic threat to the Bar. This occurs because the Competent Pro Se, will not hesitate to point out procedural deficiencies in pleadings of opposing counsel. Such counsel therefore has an increased probability of being sued for malpractice. Only in Oregon does this place State Bar financial interests at risk. An economic incentive is created to neutralize the State Bar's financial risk by denying meritworthy motions filed by Pro Se litigants, by falsely characterizing them as meritless.

The ultimate result is that the State of Oregon now has the most unethical legal profession in this entire nation, and no litigant in any case of either a civil or criminal nature can receive a fair and impartial adjudication due to the PLF.

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496. Yarbrough, supra 487 at 110; US Congressional Record, 101; 3011-36
497. Id. at 109
498. Yarbrough, supra 487 at 112; John M. Harlan to Felix Frankfurter, March 5, 1955, Frankfurter Papers, Box 39; John M. Harlan to William T. Lifland, March 8, 1955, Harlan Papers, Box 482
499. Yarbrough, supra 487 at 141; John M. Harlan to Elizabeth Frizzi, June 9, 1965, Harlan Papers, Box 596; John M. Harlan to John W. Wardlaw, November 5, 1968, Harlan Papers, Box 596, John M. Harlan to C.C. Lynch, December 6, 1965
500. Yarbrough, supra 487 at 215, Paul Brest Interview; Nina Totenberg, The Washingtonian Magazine, January 1974, p.42
501. Tinsley E. Yarbrough, *John Marshall Harlan - Great Dissenter of the Warren Court*, at 300-301 (Oxford University Press, New York 1992)
502. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.*, at 19, (Charles Scribner's Sons, New York, 1994); Interviews with Lewis Powell and his sister Eleanor Powell
503. Jeffries, supra 502 at 24; Louis Powell, Sr. to Louis Powell, Sept. 18, 1928
504. Jeffries, supra 502 at 26, Interview with J. Harvie Wilkinson Jr.
505. Jeffries supra 502 at 55; Interview with Lewis Powell, Interview with J. Harvie Wilkinson Jr.
506. Jeffries, supra 502 at 189
507. Jeffries, supra 502 at 233; Louis Powell, Interview and Remarks at Testimonial Dinner, Dec. 1971
508. Jeffries, supra 502 at 234
509. Jeffries, supra 502 at 256; Interview with Louis Powell
510. Jeffries, supra 502 at 469; Interview with Robert C. Comfort
511. Jeffries, supra 502 at 557; *Lewis v. New Orleans*, 408 U.S. 913 (1972)
512. Andrew L. Kaufman, *Cardozo*, at 15-18,(Harvard University Press, 1998); George Martin, Causes and Conflicts: *The Centennial History of the Association of the Bar of the City of New York*, (1970) ; Charges against Albert Cardozo
513. Kaufman supra 512 at 21; Interview with Aline Goldstone (June 11, 1962). Aline Goldstone was a great-niece, and her parents had known Cardozo's parents. Annie Nathan Meyer, *It's Been Fun: An Autobiography*, 92 (1951) Municipal Archives of the City of New York, New York Department of Records and Information Services, Death Certificate No. 332098
514. Kaufman supra 512 at 27
515. Kaufman supra 512 at 48-49; Columbia College Law School, Registers for the Years 1889 to 1890 and 1890 to 1891, Columbia University Archives, New York, N.Y.
516. Kaufman, supra 512 at 232; Maud Nathan, *Once Upon a Time and Today*, 178-179 (1933); Eleanor Flexner, *Century of Struggle*, 281, 300-301 (1975)
517. Kaufman, supra 512 at 232; Report to the consultation, Cardozo Memoranda, New York State Archives, Albany, New York, Box 3, Folder 3880 (motion 28, Oct. 1, 1928)
518. Kaufman, supra 512 at 232-233
519. Kaufman, supra 512 at 233; Report in *In Re McKenna*, Cardozo Memoranda, New York State Archives, Albany, New York, Box 2, Folder 2285 (motion 6, May 4, 1925)

520. Kaufman, supra 512 at 204; Arthur L. Corbin, "*The Judicial Process Revisited: Introduction*," 71 Yale Law Journal 195, 197-198 (1961)
521. Kaufman, supra 512 at 370; Letter from Cardozo to Felix Frankfurter, July 4, 1923, Felix Frankfurter Papers, Harvard Law School Library, Mass.
522. Kaufman, supra 512 at 445
523. G. Edward White, *Earl Warren - A Public Life*, at 13 (Oxford University Press, New York 1982) E. Warren, "*The Memoirs of Earl Warren"* 33 (1977)
524. White, supra 523 at 8-13
525. White, supra 523 at 15; J. Weaver, "*Warren: The Man, The Court, The Era"* at 32
526. White, supra 523 at 16; E. Warren, supra 542
527. White, supra 523 at 34
528. White, supra 523 at 35; Powe, "*Earl Warren: A Partial Dissent*," 56 No. Cal. L. Rev. 408, 416 (1978)
529. White, supra 523 at 40
530. White, supra 523 at 76; E. Warren, "*The Memoirs of Earl Warren*" (1977)
531. White, supra 523 at 77; E. Warren, supra 542
532. White, supra 523 at 142
533. Dennis J. Hutchinson, *The Man Who Once Was Whizzer White*, at 22 (The Free Press, New York 1998)
534. Id at 21
535. Id at 84
536. Hutchinson, supra 533 at 102-103; William H. Orrick Oral History, 61
537. Hutchinson, supra 533 at 140
538. Hutchinson, supra 533 at 175-176; "*Sinking of PT 109*" Report - Naval Historical Center, Action Report, Serial 006(64341), dated Jan. 13, 1944
539. Hutchinson, supra 533 at 176; Hamilton, Nigel, "*JFK: Reckless Youth*" at 577
540. Hutchinson, supra 533 at 177
541. Id at 199
542. Id at 203
543. Id at 254
544. Hutchinson, supra 533 at 258; Wofford, *Of Kennedys and Kings*, 93-94; see also Wofford Oral History, 124
545. Hutchinson, supra 533 at 348
546. Hutchinson, supra 533 at 344; *Miranda v. Arizona*, 384 U.S. 436 (1966)
547. Hutchinson, supra 533 at 368
548. Id at 363
549. Hutchinson, supra 533 at 463-465; Text of Letter of Byron White October 20, 1975 to the Chief Justice Regarding Justice William O. Douglas
550. Gunther, Gerald, *Learned Hand-The Man and the Judge*, P. 400 (Harvard University Press, Mass. 1994); Citing Irving Dilliard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3d ed., P. 34 (New York: Alfred A. Knopf, 1960)
551. Gunther, at 409. Correspondence Learned Hand to Frances Hand Oct. 9, 1929.
552. Id. At 4. Family Interviews II, 19.
553. Id. At 29. Louis Henkin Interviews, *Reminiscences of Learned Hand* (1957) Columbia Oral History Collection.
554. Id. at 95. Mildred Minturn Diary, P.64-70 (17 January, 1903) Minturn Papers, England.
555. Id. at 185. Personal Correspondence between Learned Hand, Frances Hand and Louis Dow.
556. Id. at 107. Learned Hand's extemporaneous remarks to a dinner of the New York Legal Aid Society, 1951, recorded by a stenographer, and filed with Allen Wardwell - Learned Hand correspondence, 82-39.
557. Id. at 163. Learned Hand to Oliver Wendell-Holmes, Jr., 22 June 1918, Holmes Papers, Harvard Law School, 43-30
558. Id. at 247-248. Correspondence Learned Hand to Felix Frankfurter, (9 October 1914).
559. Id. at 248. Hand, *Normal Inequalities of Fortune*, The New Republic, (6 February 1915).

560. Id. at 300-301. United States v. Drexel, 190-23 (13 February 1932).
561. Id. at 474. Pre-conference memo in NLRB v. Standard Oil Co., 11 October 1943, P.206-18.
562. Id. at 358. Hand to Eliot Wadsworth, 22 May 1920, 46-26.
563. Id. at 454. Tennessee Valley Authority questionnaire sent on April, 1935 about Hand's law clerk Alexander B. Hawes.
564. Id. at 578. Hand to Bernard Berenson, 2 August, 1947, 99-19.
565. Id. at 588-589. Hand, *A Plea for the Open Mind and Free Discussion*, no. 36 in Dilliard, *The Spirit of Liberty*, 274, 284.
566. Id. at 591. Dilliard, *The Spirit of Liberty*, 291-296.
567. Id. at 617. Hand Dissenting Opinion, Remington 208 F.2d 571-75,
568. Id.
569. Id. at 625.
570. Id. at 629.
571. Id.
572. Id. at 630. Martin Shapiro, Morals and Courts: The Reluctant Crusaders, 45 Minn. L.Rev. 897, 917 (1961).
573. Id. at 630.
574. Id.
575. Id. at 632-633. *Repouille v. United States*, 165 F.2d 152-53 (2d Cir. 1947).
576. *U.S. v. Francioso*, 164 F.2d 163 (2d Cir. 1947)
577. Gunther, supra 550 at 635
578. Gunther, supra 550 at 635-36. *U.S. ex rel Guarino v. Uhl, Director of Immigration*, 107 F.2d 399 (2d Cir. 1939), Hand Pre-Conference Memorandum 19 October 1939, 202-12.
579. *U.S. ex rel Guarino v. Uhl, Director of Immigration*, 107 F.2d 399, 400 (2d Cir. 1939).
580. Gunther, supra 550 at 636-37. *Posusta v. United States,* 285 F.2d 533 (2d Cir. 1961)
581. Id.
582. Gunther, supra 550 at 665. Correspondence Felix Frankfurter to Learned Hand, 13 February, 1958.
583. Id. at 667. Correspondence Felix Frankfurter to Learned Hand, 17 September, 1957.

APPENDIX

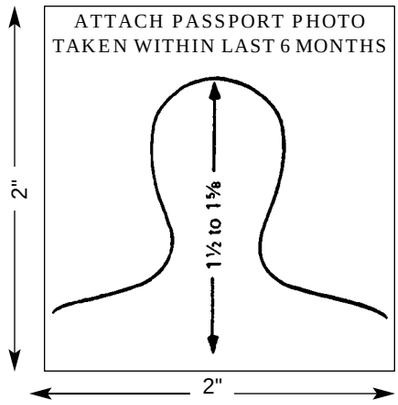
1. **ALABAMA STATE BAR APPLICATION FORMS**

ALABAMA STATE BAR
Telephone (334) 269-1515
415 Dexter Avenue
Mail: Admissions, P.O. Box 671
Montgomery, Alabama 36101

TO THE COMMITTEE ON
CHARACTER AND FITNESS OF THE
BOARD OF COMMISSIONERS
OF THE
ALABAMA STATE BAR

APPLICATION FOR ADMISSION
(Revised October 1998)

MUST BE TYPEWRITTEN



IF YOU ARE AT THE PRESENT TIME A LAW STUDENT AND HAVE NOT FILED THE STUDENT REGISTRATION APPLICATION, YOU MUST INCLUDE SUCH APPLICATION WITH THIS FILING.

1. Law school attended/attending _____

   City/State _____ Date of Graduation _____

2. If a student, state anticipated date of graduation _____

3. Did you file a Student Registration Application? Yes or No _____

   Month and year filed. _____

THIS RULE APPLIES TO *EVERYONE* WHO DESIRES ADMISSION TO THE BAR OF ALABAMA. IF YOU HAVE COMPLETED LAW SCHOOL AND DID NOT FILE THE STUDENT REGISTRATION APPLICATION AS REQUIRED BY RULE I, A, YOU MUST SUBMIT A NOTARIZED AFFIDAVIT (no special form required) STATING REASONABLE CAUSE FOR NOT HAVING FILED SUCH APPLICATION AND ATTACH THERETO A CHECK MADE PAYABLE TO THE ALABAMA STATE BAR IN THE AMOUNT OF $100. THE AFFIDAVIT AND CHECK MUST BE ATTACHED TO THIS APPLICATION (RULE I,C).

4. Is your residency other than Alabama? Yes or No _____

5. Were you a <u>non-resident</u> of Alabama at the time you graduated law school? Yes or No _____

6. (a) Have you filed an application, preliminary or otherwise, leading to a bar examination in a jurisdiction other than Alabama? Yes or No _____
   State(s) _____
   (b) Are you planning to file in another jurisdiction ( ) or to take an exam in another jurisdiction ( ) prior to taking the Alabama bar exam? Yes or No _____
   State(s) _____
   (c) Have you taken a recent bar examination and are now awaiting the results? Yes or No _____
   State(s) _____

7. Have you been admitted to the bar of any jurisdiction? Yes or No _____
   State(s) _____

IF YOU HAVE ANSWERED "YES" TO 4, 5, 6 or 7, YOU MUST FILE THE NATIONAL CONFERENCE OF BAR EXAMINERS' (NCBE) APPLICATION. Said application may be obtained from the Admissions Office of the Alabama State Bar and MUST BE FILED WITH THIS APPLICATION (Rule II, B(2)).

8. Social Security Number _____

9. Driver's License: State _____ Number _____

10. Date of Birth: Month _____ Day _____ Year _____ Age _____

11. Birthplace: City _____ State _____

12. Do you wish to typewrite the examination? Yes or No _____
    YOU MUST FURNISH YOUR OWN MANUAL/ELECTRIC TYPEWRITER.
    NO MEMORY OR OTHER ELECTRONIC EQUIPMENT MAY BE USED.

13. (a) Will you require special accommodations to take the Bar Examination?
    Yes or No _____
    (b) If yes, for purposes of determining appropriate accommodations, please give details and attach the documentation supporting your request.
    _____
    (Deadline for Requests: May 1 — July Exam December 1 — February Exam)

Do not write in this block
Year

14. (a) STATE DATE YOU WISH TO BE EXAMINED: February ____ Year July ____ Year
    (Exams are given on the last Monday, Tuesday and Wednesday of each February and July: *ESSAY -- Monday & Tuesday; MBE -- Wednesday)*
    (b) Have you taken the exam in Alabama previously? Yes or No _____
    Month and year of last exam taken _____

15. YOUR FULL NAME (NO INITIALS): _____
    PRESENT MAILING ADDRESS:
    STREET and/or POST OFFICE: _____

    CITY AND STATE: _____ ZIP _____
    (Include 4-digit suffix)

    TELEPHONE: (Include Area Codes) (Business) _____ (Home) _____

16. (a) MARITAL STATUS: Single ( ) Married ( ) Separated ( ) Divorced ( ) Widowed ( )

(b) State the following of each marriage:

DATE	CITY & STATE	FULL NAME OF SPOUSE

(c) If presently married, state the following:

SPOUSE'S EMPLOYER	POSITION	BUSINESS PHONE

(d) If you have ever been divorced, state the following in each instance:

DATE	CITY & STATE	FULL NAME OF SPOUSE	GROUNDS FOR DIVORCE

IF LEGALLY SEPARATED, ATTACH COPY OF SEPARATION PAPERS. IF DIVORCED, OR IF MARRIAGE WAS ANNULLED OR SET ASIDE, ATTACH COPIES OF THE COMPLAINT AND FINAL DECREE IN EACH INSTANCE.

(e) Was alimony or child support required of you? Yes or No _____

(f) Are you in full compliance with such support payments? Yes or No _____

If NO, give a full statement. _____

17. Have you ever been known by any other name (including a nickname)? Yes or No _____

If YES give name and state facts fully (if change was made by court order, *attach a certified copy of such order*). _____

(If you are filing under Rule II, B(2), go to Question 19)

18. List every permanent and temporary place of abode where you have resided more than one month since your eighteenth birthday or for the past 10 years.

CITY & STATE	ZIP	STREET ADDRESS	FROM MONTH & YEAR	TO MONTH & YEAR

19. State the following concerning your parents (if a parent is deceased please give name; if retired, please so state and give former employer and position; if owner of business, give name of business):

Father's Name FULL Address Home Phone

Employer Position Business Phone

Mother's Name FULL Address Home Phone

Employer Position Business Phone

20. (a) Are you a citizen of the United States? Yes or No _____

(b) If foreign born, state the following:

DATE OF IMMIGRATION/DATE AND PLACE OF NATURALIZATION/NATURALIZATION CERTIFICATE NO.

(c) If you have not become naturalized, have you filed a DECLARATION OF INTENT to become a citizen of the United States of America? Yes or No _____

(d) If no, what is your current status? _____

21. (a) Are you a citizen and legal resident of Alabama? Yes or No_____

(b) If Yes, in what city and county do you claim legal residence? _____

(c) How long have you been a citizen and legal resident of Alabama?_____

22. (a) City and State of your present voter registration?_____

(b) If you are filing as a non-resident, please state your reason for filing for admission in Alabama:

23. Please indicate if you are planning to become a citizen and legal resident of Alabama: Yes or No _____

Date _____ City _____

24. (a) Are you now or have you ever been a member of the armed forces of the United States, including the National Guard, Coast Guard, or any of the reserve components? Yes or No_____

(b) If Yes, complete the following:

(1) Branch of Service_____

(2) Dates, Active Duty _____ (3) Dates, Reserve Duty _____

(4) Highest rank achieved _____ (5) Service number_____

(6) Date and type of discharge _____

(7) If less than Honorable, explain fully_____

ATTACH A COPY OF FORM DD/214 TO THIS APPLICATION

(c) While in service were you ever charged with violating the Articles of War or any provision of the Uniform Code of Military Justice? Yes or No_____

(d) If Yes, please state the nature of the charge, the facts, disposition of the matter and the location and designation of the military establishment where such proceeding took place:

25. ATTENTION: MALE APPLICANTS

Any male, born after 1959, must be registered in compliance with the Military Selective Service Act (50 U.S.C. App. 451 et seq.). Refusal to register is a felony, punishable by imprisonment for not more than 5 years and a fine of not more than $250,000, or both.

Selective Service System, P.O. Box 94638, Palatine, IL 60094-4638
Selective Service Information number: 1-847-688-6888

ATTACH PHYSICAL EVIDENCE OF YOUR COMPLIANCE RECEIVED FROM SELECTIVE SERVICE

26. List all Colleges and Universities (other than law school) that you have attended:

NAME OF SCHOOL	CITY AND STATE	DATES OF ATTENDANCE	TYPE OF DEGREE

27. List all Law Schools you have attended or are now attending:

NAME OF SCHOOL	CITY AND STATE	DATES OF ATTENDANCE	TYPE OF DEGREE

IF YOU HAVE GRADUATED LAW SCHOOL, ATTACH A CERTIFICATE OF GRADUATION FROM THE DEAN OF THE LAW SCHOOL. If you have not graduated law school you should request of the proper school officials that such certification be mailed to this office *IMMEDIATELY* upon your graduation. *You cannot be certified to sit for the Alabama State Bar Exam until such Certification of Graduation is received.*

The Certification of Graduation must be on school letter head, with the school seal affixed, and signed by the dean or certifying official. They MUST substantially be in the following form:

"DATE

This is to certify that (applicant's name) has pursued and satisfactorily completed as a full-time resident law student of (name of school) a course of law studies for a period of three years of at least thirty weeks each (or whatever the case may be, see Rule IV, C) and has completed all requirements for the J. D. degree.

Said degree was awarded on (date)."

28. (a) Regardless of whether the record has been expunged, cancelled or annulled, or whether no record was made, have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled or requested to resign from any school, college or university, or otherwise been subject to discipline by any such school or other institution or requested or advised by any such school or institution to discontinue your studies therein?

Yes or No _____

(b) If Yes, please state the cause, circumstances, date of occurrence, and the final disposition of each such occurrence.

_____

_____

_____

29. Remarks, Honors, etc.

_____

_____

_____

_____

30. (a) List all student loans as to the following: If not applicable, check here ( )

NAME AND ADDRESS OF LENDER	STATUS OF LOAN (Current, deferred, delinquent)	AMOUNT OF LOAN

(b) If a loan is delinquent, please give details:

_____

_____

31. (a) Do you have specific legal or law related employment for the next 12 months? Yes or No _____

(b) If Yes:
Employer _____ (Phone: _____)

Mailing Address _____
Street or Post Office City State ZIP

Position _____ Date you began or will begin _____

(c) If No, state employment plans for next twelve months:

_____

_____

32. THIS ITEM REQUIRES THE LISTING OF ALL EMPLOYMENT SINCE YOUR SIXTEENTH BIRTHDAY INCLUDING THE ACTUAL PRACTICE OF LAW: Have you ever been employed, self-employed or associated with any occupation, business, enterprise or profession, including the military, either part-time or full-time, paid or unpaid (include employment as law clerks, etc.)

Yes or No _____

If Yes, beginning, with your current employment, list the name and mailing address (ZIP included) of each employer or associate, the business or enterprise, the position or association you occupied and the month and year of the beginning and ending of each employment, self-employment or association. ALL PERIODS OF TIME SINCE YOUR SIXTEENTH BIRTHDAY MUST BE COVERED, IF UNEMPLOYED OR A STUDENT, GIVE THE DATES.

FROM/TO MONTH & YEAR — NAME AND ADDRESS OF EMPLOYER

(1) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reason for Leaving _____

(2) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reason for Leaving _____

(3) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reason for Leaving _____

(4) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reason for Leaving _____

(5) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reason for Leaving _____

(6) _____ to _____ Name _____

Address _____ City _____ State _____ Zip _____

Nature of Business _____ Position _____ Reasoning for Leaving _____

33. Have you ever been discharged or resigned from any employment after being told that your conduct or work was unsatisfactory, or that you were suspected of or were under investigation for any wrong-doing?

Yes or No _____

If yes, state facts FULLY _____

_____

_____

_____

34. (a) List EACH traffic violation you have been charged with (including all violations to which you were allowed to enter a "nolo" plea, but do not include parking violations) and its disposition. If the original charge was reduced to a lesser offense, so state and give the original charge.

IF NOT APPLICABLE, check here ( )

DATE PLACE NATURE OF OFFENSE COURT DISPOSITION

_____

_____

_____

_____

_____

ATTACH A CURRENT DRIVING ABSTRACT FROM THE DEPARTMENT OF PUBLIC SAFETY

(b) List each instance in which you, either as an adult or as a juvenile, have been stopped or arrested or taken into custody or questioned or accused formally or informally of the violation of any law. You must disclose each instance even though charges may not have been formally brought against you or they were dismissed or you were acquitted or adjudication was withheld or a conviction was reversed, set aside or vacated or the record sealed or expunged and REGARDLESS OF WHETHER YOU HAVE BEEN TOLD THAT YOU NEED NOT DISCLOSE ANY SUCH INSTANCE. (You need not list traffic offenses set out above.) ATTACH A DETAILED EXPLANATION IN YOUR OWN WORDS.

IF NOT APPLICABLE, check here ( )

DATE PLACE NATURE OF OFFENSE COURT DISPOSITION PUNISHMENT

_____

_____

OBTAIN AND ATTACH A COPY OF ALL COURT RECORDS INVOLVED IN EACH INSTANCE

(c) Did any of the instances listed above result in conviction of a felonious crime? Yes or No _____

If yes, which of the instances listed resulted in conviction of a felony? _____

_____

(d) If yes, have you received a full pardon, including restoration of political rights? Yes or No _____

If yes, ATTACH A CERTIFIED COPY OF THE CERTIFICATE OF PARDON

(e) Did any of the instances listed result in a sentence of confinement in a state prison or penitentiary, even if such sentence or imprisonment was suspended? Yes or No _____

If yes, which instance resulted in the order of confinement? _____

_____

35. Have you ever been offered or granted immunity, testified or been called on as a witness in any criminal proceeding in which you were not a party? Yes or No _____

If yes, state the place, date, name of the defendant, nature of the act or the proceeding, the court and the circumstances.

_____

_____

36. Have you ever been accused of or charged with fraud, perjury, misrepresentation or false swearing in a judicial or administrative proceeding? Yes or No _____

If yes, give details, including dates, nature of the accusation, and the names and addresses of all persons involved.

_____

_____

37. Have you ever been adjudicated a bankrupt, or has a petition in bankruptcy ever been filed by you or against you, either alone or in association with others? Have you ever been brought in as a party to any proceedings in a bankruptcy court; or have you ever been sued or threatened with suit by the receiver, trustee, or other authority of any bankruptcy estate, for unlawful transfer, conspiracy to conceal assets, or any other fraud or offense, whether or not punishable by criminal law?

Yes or No _____

If yes, state facts fully_____

_____

_____

ATTACH A COPY OF ANY BANKRUPTCY PROCEEDINGS TO THIS APPLICATION

38. State every application presented and examination taken by you for admission to the bar, including any previous applications to the Alabama State Bar. (This should include applications subsequently withdrawn or applications for reinstatement.)

NAME AND ADDRESS OF JURISDICTION	DATE OF EXAMINATION MONTH & YEAR	SUCCESSFUL UNSUCCESSFUL OR OTHER DISPOSITION

Other than an Alabama application, A CERTIFIED COPY OF EACH SUCH APPLICATION MUST BE FORWARDED TO THIS OFFICE FROM THE JURISDICTION WHERE APPLICATION WAS FILED.

39. IF YOU PASSED A BAR EXAMINATION OR IF YOU ARE A MEMBER OF THE BAR OF ANY JURISDICTION — ATTACH A CERTIFICATE OF GOOD STANDING FROM SUCH JURISDICTION.

40. Have you ever been disbarred, suspended from practice, reprimanded, censured or otherwise disciplined or disqualified as an attorney or as a member of any profession or organization, or holder of any office, public or private; or have any complaints or charges, formal or informal, ever been made or filed or proceedings instituted against you.

Yes or No _____

If yes, state the dates, the facts, the disposition of the matter, and the name and address of the authority in possession of the record thereof.

_____

_____

41. ACADEMIC EXAM

(a) Have you taken the Multistate Bar (MBE) within the last 20 months? Yes or No_____

If yes, give State _____ and Date _____

(b) Do you request the Board to accept your prior MBE score pursuant to Rule VI, J, of the Rules Governing Admission to the Alabama State Bar? Yes or No_____

If yes, obtain and file with this application the CERTIFICATION OF MBE SCORE FORM, which may be obtained from the Admissions Office of the Alabama State Bar.

TO QUALIFY FOR TRANSFER . . . A MBE SCORE MUST BE TRANSFERRED WITHIN 20 MONTHS OF AN APPLICANT'S SITTING THE MBE EXAM, THE APPLICANT MUST HAVE ACHIEVED A SCALED SCORE OF 140 OR ABOVE, AND THE APPLICANT MUST BE ADMITTED TO THE JURISDICTION WHEREIN THE MBE WAS TAKEN.

(c) Have you taken the Alabama Board of Bar Examiners' Exam (BBE/ESSAY) within the last 20 months?

Yes or No _____

(d) If yes, do you request the Board to accept your prior Essay Score pursuant to Rule VI, J, of the Rules Governing Admission to the Alabama State Bar? Yes or No _____

42. ETHICS EXAM

(This exam is administered by the NCBE in March, August & November. Application materials may be obtained from the NCBE Application Dept., Iowa City, Iowa; 1-319-337-1287)

Before admission to the Alabama State Bar, each applicant must have successfully passed the MPRE (Multistate Professional Responsibility Examination). A scaled score of 75 or above must be achieved. Successful completion of the MPRE at any time WITHIN the 12-month period prior to taking the Alabama Academic Bar Examination will be accepted. Such successful completion of the MPRE may be carried over for a period of 20 months FROM THE TIME THAT THE FIRST ALABAMA ACADEMIC EXAM IS TAKEN, if the Academic Examination is not passed. If an applicant passes the Academic Examination, but has not successfully completed the MPRE, the applicant shall have a period of 20 months from the date of the Academic Exam in which to successfully complete the MPRE (See Rule VI, K).

(a) Have you taken the MPRE exam? Yes or No _____

If yes, state: Date _____ Location _____ Scaled Score _____

IF YOU DID NOT INDICATE AT THE TIME YOU TOOK THE MPRE THAT ALABAMA WAS TO RECEIVE YOUR SCORE, YOU MUST ATTACH A COPY OF YOUR INDIVIDUAL SCORE SHEET OR HAVE YOUR SCORE VERIFIED TO US FROM THE NCBE AUTHORITIES.

(b) If no, or if you have taken the MPRE but failed to achieve a scaled score of 75 or above, or if the time limits set out above have elapsed, state the date and location you plan to sit for the MPRE:

Date _____ Location _____

(IF YOU ARE FILING UNDER RULE II, B(2), GO TO QUESTION 51)

43. (a) In the past 5 years, have you received treatment for a serious nervous, emotional or mental illness which would adversely impact on your ability to practice law?

If yes, give full explanation _____

_____

(b) If yes, above, give the full name and address of the doctor(s)/counselor(s) who treated you and the institution(s) where you were treated, and the date(s) of such treatment.

Disclosure of this information will not automatically disqualify your application for admission.

_____

_____

44. (a) Are you now, or have you ever been addicted to or had a problem with, or have you undergone treatment or counseling for the use of narcotics, drugs, or intoxicating liquors? Yes or No _____

If yes, give full explanation _____

_____

_____

(b) If yes, give the full name and address of the doctor(s)/counselor(s) who treated you and the institution(s) where you were treated, and the dates(s) of such treatment.

_____

_____

45. (a) Are there any unsatisfied judgments against you? Yes or No _____

(b) Have you ever had debts which were 90 days past due? Yes or No _____

(c) Have you ever had a credit card revoked? Yes or No _____

If yes to either (a), (b) or (c), list details, giving names and addresses of creditors, amounts, dates, and the nature of the judgments or debts, and the reason for nonpayment.

_____

_____

46. Have you ever applied for or held a bonded position? Yes or No _____

If yes, (1) specify the nature of the position, dates it was held, the amount of bond, and (2) whether anyone ever sought to recover upon your bond or to cancel same.

_____

_____

47. Has a bond ever been refused where you were to be the bonded person or has a bond ever been revoked where you were the bonded person? Yes or No _____

If yes, give details _____

_____

48. (a) Have you ever been a party or otherwise involved in ANY legal proceedings, civil or criminal? Yes or No _____

(b) If yes, state facts FULLY. (Do not repeat those already listed elsewhere in this application)

_____

_____

49. Have you applied for or held a license, other than as an attorney at law, which required proof of good character (e.g., certified public accountant, patent attorney, real estate broker, etc)? Yes or No _____

If yes, as to each such application, state the license applied for, date of the application, the name and address of the authority to whom made, the disposition of the application and, if granted, the present status of each such license.

_____

_____

50. Give the names and addresses of five persons who are not fellow law students, professors, instructors, relatives, or current employers, to whom you refer as to your character, stating how long you have known each. Please make certain that no two persons listed are members of the same household. (Do not list those attorneys from whom you have enclosed affidavits.)

(1) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

(2) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

(3) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

(4) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

(5) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

51. If you are filing as a non-resident, please list at least two Alabama residents who can give you a personal recommendation either through personal knowledge or by inquiry.

(1) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

Recommendation can be given by personal knowledge _____ by inquiry _____

(2) Name (Mr., Ms., Mrs., etc.) _____

Mailing Address _____

City _____ State _____ ZIP _____

Occupation _____ Time Known _____

Recommendation can be given by personal knowledge _____ by inquiry _____

52. PLEASE READ AND THEN COPY THE FOLLOWING STATEMENT IN YOUR NORMAL METHOD OF HANDWRITING.

I am aware that this application is continuing in nature and must give correctly and fully the information therein sought as of the date that I am sworn in as a member of the Alabama State Bar. To that end, I will immediately inform the Admissions Office of the Alabama State Bar, in writing, of any change or discovered error in the requested information that may occur between today's date and the date I am sworn in as a member of the Alabama State Bar.

53. Is there any other incident(s) or occurrence(s) in your life, which is not otherwise referred to in this application, which has bearing, either directly or indirectly, upon your character and fitness for admission to the Bar?

Yes or No _____

If yes, state full detail _____

54. Loyalty to United States government:

(a) I can take and subscribe to an oath or affirmation that I have not organized or helped to organize or been a member of any group of persons which I knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or other unlawful means.

Yes or No _____

(b) I believe in the form of government of the United States and I am, without any reservation, loyal to and prepared to support the constitutions of the United States, and of the State of Alabama.

Yes or No _____

(c) If No to (a) or (b) state full details: _____

_____

55. The oath required of attorneys in Alabama is as follows:

"I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or malice, and that I will support the constitution of the State of Alabama and of the United States, so long as I continue a citizen (or legal resident) thereof, so help me God."

Do you approve of requiring those intending to become attorneys to assume the obligations contained in this oath?

Yes or No _____

If No, state full details. _____

_____

_____

Signature of Applicant

STATE OF _____)

COUNTY OF _____)

I, _____ , being first duly sworn, on oath or affirmation, do hereby depose
Name of Applicant

and say:

1. That I have read this application, including the instructions, and my complete answers, and that the same are full, true and complete in all respects, and that I have completed such answers, and provided such information without mental reservation or purpose of evasion;

2. That I have carefully read the Rules of Professional Conduct and the Rules of Disciplinary Procedures of the Alabama State Bar, and if admitted to the practice of law, agree at all times to be bound thereby, and;

3. If I am successful in attaining a passing score on such examination and if I am found morally fit to practice law in the State of Alabama, I agree that I will subscribe to the oath of office propounded by the Supreme Court of Alabama.

_____

Signature of Applicant

Subscribed and sworn to before me this _____ day of _____ , 19_____ .

_____

Notary Public

AFFIX SEAL HERE

My Commission expires: _____

Examined and approved this _____

day of _____ , 19____

_____

_____

_____
Of Committee on Character and Fitness

Examined and disapproved this _____

day of _____ , 19____

_____

_____

_____
Of Committee on Character and Fitness

APPLICATION AND
SUPPORTING PAPERS

OF

_____
For admission to
Bar
Examination _____ ,19____

Filed in office of Secretary this _____

day of _____ 19____

_____

_____
Secretary

9-1991