19

CAN THE JUDICIARY WITHSTAND SCRUTINY UNDER ITS' OWN STATE BAR ADMISSION STANDARDS?

By Evan Gutman CPA, JD (2002)

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)